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91-1512

NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

RODNEY D. ROUSH, Petitioner

vs.

JUDITH ANNETTE ROUSH, BETTY WICKLINE, The STATE OF WEST VIRGINIA, Acting Through Its DEPARTMENT OF HUMAN SERVICES, and RHONE-POULENC AG COMPANY, a Pennsylvania corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1.

WHETHER ALL OR SOME SPECIFIC PORTIONS OF THE FAMILY OBLIGATIONS ENFORCEMENT ACT ("FOEA") W. VA. CODE §48A-1-1 ET SEQ.) WHICH ESTABLISHES, AMONG OTHER THINGS, THE FAMILY LAW MASTER ("FLM") SYSTEM PROVIDING FOR APPOINTMENT AND SERVICE OF LAWYERS NOT JUDGES AS HEARING OFFICERS IN ALL WEST VIRGINIA DOMESTIC RELATIONS LITIGATION WHOSE SALARIES ARE PAID IN GREAT PART BY THE WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES ("DHS") WHOSE REPRESENTATIVES ROUTINELY APPEAR BEFORE FLMS REPRESENTING ONE SIDE, IS UNCONSTITUTIONAL AND VOID AS VIOLATIVE OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS, THE WEST VIRGINIA CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT AND IS AN UNCONSTITUTIONAL INCURSION OF THE EXECUTIVE INTO THE JUDICIARY RESULTING IN THE DENIAL OF QUALIFIED, INDEPENDENT ELECTED JUDGES HEARING DOMESTIC RELATIONS MATTERS IN WEST VIRGINIA.

2.

WHETHER DUE PROCESS CONSTITUTIONAL GUARANTEES APPLY AND ENURE TO OBLIGORS SUCH AS PETITIONER WHO ARE INVOLVED IN INVOLUNTARY WAGE WITHHOLDING PROCEDURES (BOTH PREJUDGMENT AND POST JUDGMENT) UNDER THE FOEA SO AS TO REQUIRE A RIGHT OF HEARING AND AN ORDER FROM A STATE CIRCUIT JUDGE (NOT A FLM) AS A PREREQUISITE TO THE ISSUANCE OF WAGE WITHHOLDING DIRECTIVES UPON AN OBLIGOR'S EMPLOYER? AS A COROLLARY ISSUE WHETHER A RESULTANT "TEMPORARY ORDER" OR "RECOMMENDED ORDER" ISSUED BY A WEST VIRGINIA FLM, NOT A JUDGE, IS A SUFFICIENT CONSTITUTIONAL BASIS FOR COMPULSORY WITHHOLDING OF SUCH OBLIGOR'S WAGES.

3.

WHETHER THE WAGE WITHHOLDING DIRECTIVES AS ISSUED BY THE DHS AND SERVED UPON PETITIONER AND HIS EMPLOYER DENY PROCEDURAL DUE PROCESS IN THAT THEY FAIL TO PROVIDE CLEAR ADVICE TO THE OBLIGOR AND THE EMPLOYER OF THE OBLIGOR'S RIGHTS AND EXEMPTIONS UNDER THE WAGE WITHHOLDING PROCEDURES AS WELL AS WRITTEN ADVICE OF THE LIMITATIONS AND MAXIMUM AMOUNTS WHICH CAN LAWFULLY BE WITHHELD FROM THE OBLIGOR'S WAGES.

4.

WHETHER, IF TRUE AND PROVEN TO THE SATISFACTION OF A JURY OR THE DISTRICT COURT, ANY OR ALL OF THE RESPONDENTS' ACTS AS ALLEGED IN PETITIONER'S DISTRICT COURT COMPLAINT MIGHT HAVE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS AND MIGHT HAVE ENTITLED HIM TO INJUNCTIVE RELIEF AND/OR MONETARY DAMAGES AGAINST ONE OR MORE OF THE RESPONDENTS UNDER THE CIVIL RIGHTS ACT.

Designation of Parties

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Rodney D. Roush, the petitioner herein, prays that a writ of certiorari issue to

review the December 18, 1991 judgment of the United States Court of Appeals for the Fourth Circuit entered January 10, 1992, confirming an earlier judgment of the United States District Court for the Southern District of West Virginia at Charleston made and entered April 18, 1991.

Opinions Below

The opinion of the District Court is reported at 767 F.Supp. 1351 and the later confirming opinion of the Fourth Circuit is not reported. Both are printed in the Appendix hereto, infra, at pages 1 and 9 respectively.

Jurisdiction

A timely petition seeking Writ of Certiorari was filed with the Clerk of this Court to the Fourth Circuit judgment as required by Rule 13, and the jurisdiction of

this Court is invoked under 42 U.S.C. §1981, 1983 and Rule 10,1.(c) in that it is believed the Fourth Circuit Court of Appeals has decided an important question of federal civil rights and Constitutional law which decision is or may be in conflict with applicable decisions of other circuits and the decisions of this Court.

Constitutional Provisions and Statutes Involved

U.S. Const. Amend. V.

U.S. Const. Amend. XIV § 1.

W.Va. Const. Art. VIII, §6.

W.Va. Const. Art. VIII, §7.

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W.Va. Code §48A-4-1(e)

W.Va. Code §48A-4-3(b)

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W.Va. Code §48A-5-3(d)(13)

W.Va. Code §48A-5-3(d)(14)

15 U.S.C. §1673(c)

15 U.S.C. §1693m(g)

42 U.S.C. §§1981, 1983 et seq.

Statement

In 1986 only months after encouraging her husband, Rodney Roush ("Petitioner"), to adopt her son John who was born of a previous marriage, respondent Judith Roush ("Exspouse") initiated a divorce action against Petitioner in the Circuit Court of Kanawha County, West Virginia (C.A. No. 86-C-2783). Among other things her divorce complaint requested alimony for herself and support for both her son and a daughter, Melissa, born to the parties.

West Virginia domestic relations procedures established under the FOEA (W. Va Code §48A-1-1 et seq.) which was enacted and

became effective somewhere around the middle of 1986 provide that family law masters (FLMs) appointed by the Governor whose salaries are paid by the West Virginia Department of Human Services (DHS), as supplemented by fees generated from statutory charges to the litigants, rather than circuit judges, hear all divorce and domestic relation matters. This Act changed existing law which previously had Circuit Judges hear such matters, but under previous law and in some circuits where utilized, Special Commissioners appointed by judges took evidence and made recommendations to the judges. Such recommendations, however, had no effect as court orders.

Under the new system FLMs have authority to enter default orders when a party fails to appear and to issue "temporary

orders" as to alimony, child support, custody, etc., which are binding unless reversed or revised on review by a circuit court (W. Va. Code §48A-4-3(b). All other FLM acts under this system (including final divorce decrees) are only "recommended orders", not binding or effective unless both parties waive objection thereto or until reviewed and confirmed by the Circuit Court (W. Va. Code §48A-4-4).

There was apparently some confusion as to whether a Special Commissioner or FLM should hear the Roush case as it was initially referred to a Special Commissioner who held a temporary hearing and on August 7, 1986 recommended custody of both children to the mother with support of $150.00 per month per child and $300 per month to the wife as temporary alimony. A temporary

order was later entered on September 29, 1986 by the Circuit Court implementing same. After having fallen behind regarding alimony due to being laid off a "Recommended Order" was later entered February 11, 1987 by Kanawha County FLM Steager finding petitioner in arrears $925.00 as to alimony, recommending judgment against him for that sum and that in addition to the previous $300 per month, he pay another $100.00 per month until he was again current. Petitioner objected and excepted to this ruling requesting Circuit Court review which never occurred.

A divorce decree was entered January 27, 1988 adopting the same child support as before but increasing alimony from $300.00 to $400.00 per month based upon the FLM's recommendations. Petitioner appealed this

decision to the West Virginia Supreme Court on several bases including the fact he had later discovered his wife was not yet divorced from her prior husband (the decree had not been entered) when she married him, and that appeal was not resolved until July 26, 1990, long after respondents began wage withholding against him.

As the result of another FLM hearing before FLM another "recommended order" issued February 16, 1988 finding petitioner was still behind $880.00 regarding alimony. Also at this hearing it was noted petitioner's adopted son had left his Ex-spouse returning to North Carolina to live with his natural father. Because of this Petitioner moved the FLM to be relieved of the $150.00 per month in child support to his Ex-spouse, and the FLM "recommended" a

reduction in his son's support from $150.00 to $50.00 per month but also recommending that Petitioner establish a special savings account in his adopted son's name depositing the $100.00 per month into such account. This Petitioner did although he objected and excepted to such recommendation taking the matter to the Circuit Court as provided by statute before such recommendations can become effective as an order. Neither the temporary order, the divorce decree nor either of the recommended orders mentioned above authorized, recommended or authorized wage withholding against Petitioner and there were never any other orders entered regarding such subject before withholding commenced.

Nevertheless, on March 22, 1988 a wage withholding notice and directive (D.C.

Complaint Exhibit 1, App. p. 143) was issued by respondent Betty Wickline ("Wickline"), an employee of the W. Va. DHS, which was mailed to Petitioner and his employer, respondent Rhone-Poulenc AG Company ("Employer") notifying them that wage withholding was being initiated. The notice provided that $700.00 per month was to be withheld from his wages, composed of $300.00 per month in child support for the two children and $400.00 per month for alimony. The notice also indicated an additional 10% of petitioner's wages was to be withheld and applied to a then alleged alimony arrearage of $400.00. The notice indicated this would all occur unless Petitioner requested a hearing before the DHS on such matter within 14 days, and if such hearing was requested it would occur on April 6, 1988 at 9:00 a.m.

at the DHS offices. The notice further indicated as the law required, an FLM hearing had been scheduled at 9:00 a.m. April 7, 1988, the following day, to effectuate such intended withholding if petitioner did not accede.

Petitioner did object requesting a hearing and he appeared before Wickline at the DHS offices April 6, 1988 raising facts adduced at the earlier February 11th and February 16th FLM hearings that: his ex-spouse was no longer keeping his adopted son, then seventeen, who had gone to live with his natural father, he was being excused from the $150 per month child support for such son by the FLM paying only $50 per month but depositing $100 a month into a savings account as directed and that he would be objecting to any withholding for

the son for these reasons at the FLM hearing the next day.

> "(13) That if the meeting with the children's advocate fails to resolve the issues being contested, a hearing before the family law master will be held at a time and place set forth in the notice, and that following such hearing, the master will make a **recommended decision to the circuit court;** and (14) **That a recommended decision as to withholding will become effective when it is confirmed and an order is entered by the circuit court, and that if the obligor disagrees with the master's recommended decision, he or she will be given the opportunity to make objections known to the circuit court**".

W. Va. Code §48A-5-3(d)(13). [Emphasis added].

Petitioner's evidence apparently fell on deaf ears as he was advised the DHS intended to proceed with the withholding against his wages in the indicated amounts. Next day Petitioner appeared at the FLM's office with his attorney Joseph Zak but no one appeared for the DHS or for his Ex-

spouse. As a consequence no hearing was held and no withholding order was ever issued. FLM Steager then called the DHS in petitioner's presence and that of his counsel and discussed the matter and the DHS's failure to appear (See Zak affidavit D.C. Complaint Exhibit 2, App. p. 149).

Nevertheless, despite no hearing and of no supporting court order, Wickline and the DHS issued a withholding directive to Petitioner's Employer (D.C. Complaint Exhibit 1, App. p. 143), and Petitioner's wages have been withheld since that time except for one very short period when the Circuit Court ordered it discontinued (that order was later vacated by a writ of prohibition filed by the Ex-spouse with the West Virginia Supreme Court of Appeals on other grounds). According to Wickline's deposi-

tion it is the general practice of the DHS after holding an office conference with obligors to decide internally (as they did regarding Petitioner) whether there is a sufficient mistake of fact or some other reason justifying withdrawal of the proposed withholding or a change in the amount thereof, and if they decide there is no such basis they simply bypass the scheduled FLM hearing, the recommended order and judicial review thereof as provided by the statute proceeding directly with wage withholding on obligors' employers. This is a truly amazing revelation in view of the W. Va. statute quoted above which would, if FLMs were circuit judges, arguably afford substantial due process as required by the Fifth and Fourteenth Amendments and by the CCPA [15 U.S.C. §1673(c)], as the FOEA specifically requires

such hearings, resulting orders and judicial review thereof if requested as a prerequisite to the withholding of an obligor's wages.

Under the wage withholding initiated as above described Petitioner's Employer has been withholding various amounts from Petitioner's wages over the past three years. In some weeks, as Exhibit No. 5 to Petitioner's District Court Complaint (App. p. 159) demonstrates, there has been as much as 75% of Petitioner's net weekly wages withheld by the Employer which is then paid over to the DHS and eventually to petitioner's Ex-spouse.

Over the eight months that followed Petitioner, through the involuntary withholding of his wages, was overpaying child support in an amount of $100.00 per month

thus totalling $800.00. Moreover, for a number of months after Petitioner's adopted son reached eighteen DHS/Wickline still continued to withhold for the son's support until they eventually responded to Petitioner's repeated written advice and demands. They finally reduced the amount to be suggested by $150.00 per month to a total of $550.00 per month plus ten percent toward a nonexisting arrearage long since covered by the $800 overcharge. Petitioner was never refunded any of this money.

Regarding Petitioner's duty of support for his daughter of $150.00 per month, she moved from her mother's custody in August of 1988 and thereafter resided with her father until April 11, 1989 when she was taken from his home by his Ex-spouse. Throughout that period the withholding of Petitioner's wages

for his daughter's support continued unabated despite continued notices from him that he now had her custody. Petitioner was therefore entitled to an additional credit against child support of $150.00 per month for the eight months his daughter lived with him ($1,200.00) which with the $800.00 mentioned above totalled $2,000.00 in overpayments. This credit was finally recognized at later hearings by FLM Tantlinger and Circuit Judge Hey, and in fact Michele Grinberg, the Ex-spouse's legal counsel, even stipulated that as of a hearing on July 27, 1989 before Judge Hey Petitioner had overpaid her as of that time. Despite all of this the withholding of Petitioner's wages continued, including an extra 10% for a non-existent arrearage.

Petitioner moved the Circuit Court at

a July 27, 1989 hearing to terminate further withholding of his wages which was granted (See D.C. Complaint Exhibit 4, App. p. 153).

Shortly after the above order was entered Petitioner's Ex-spouse filed a petition with the West Virginia Supreme Court of Appeals seeking a writ of prohibition to block certain portions of that order and a later order that had effected another change of custody of the daughter back to petitioner due to the ex-spouse's failure to comply with the previous order. The petition which did not raise any issue about the propriety of the judge's discontinuance of wage withholding was granted and the W. Va. Supreme Court later ruled in favor of Petitioner's ex-spouse granting the prohibition against Circuit Judge Hey, but not on the wage withholding issue. As a conse-

quence after only a very brief cessation in withholding, withholding was reinstated (again without any hearing) and it has continued unabated to the present.

September 25, 1990 Petitioner filed his federal Complaint in the Southern District at Charleston, W. Va. charging unconstitutionality of the FLM statutes, lack of due process in the procedures being employed against him, civil rights violations and excessive wage withholding by his Employer. Petitioner's Employer and Petitioner's Ex-spouse filed motions to dismiss the complaint and Wickline and the DHS filed answers. Discovery depositions of Wickline and the Ex-spouse were taken and after briefing the motions to dismiss but without any hearing the District Court (Judge Haden) granted such motions dismissing the suit by

order entered the 18th day of April, 1991, even as to Wickline and the DHS who had filed no motions to dismiss. An appeal was then taken to the Fourth Circuit.

The appeal was heard and the District Court's decision was upheld on December 18, 1991 despite language that could be construed as an implicit recognition in its opinion (App. p. 1) that Petitioner had been wronged.

Since the federal suit was filed Petitioner has been granted custody of his daughter, Melissa, and respondents have ceased to withhold any further monies attributable to her child support, but they continue alimony withholding of $92.31 per week although Petitioner is not in arrears and is now actually owed considerable overpayments by his Ex-spouse. As of this date

Petitioner has never received back any of the overpayments taken through wage withholding.

Reasons for Granting This Writ

1.

The unconstitutionality aspect of the Family Obligations Enforcement Act (FOEA) as alleged by Petitioner in his District Court Complaint was totally ignored by District Judge Haden in his decision nor was it squarely addressed in the Fourth Circuit's later opinion. Petitioner has maintained throughout this litigation that FLMs by hearing divorce and other domestic relations matters and by entering "temporary orders" and recommending other decretal orders is acting in a thoroughly judicial capacity, and although W. Va. Code § 48A-4-1(e) states they are to be considered ". . .

officers and employees in the judicial branch of government. . .", in the very same subsection it indicates they are to be paid through the Commissioner of the Department of Human Services and the Child Advocate Office who "contract" them out to the judicial branch. It is submitted this arrangement is a facade which does not meet the constitutional test of the necessary separation of powers nor does it provide citizens with a disinterested qualified judiciary as required by the W. Va. Constitution so as to better assure impartial, independent decisions.

Take the present case, counsel for the Ex-spouse and her law firm at times while this case has been in progress, and also while the state divorce action between the parties has been in progress, have also been

acting as legal counsel for the DHS representing it in various litigation in which it has been involved. Then consider that the FLMs who have made the temporary rulings against Petitioner are paid by the same DHS who was at the very same time appearing before such FLMs through its Child Advocate representing and acting for one of the two party litigants (Ex-spouse Judith Roush in this case). Such an arrangement not only dispels any appearance of fairness or hope of propriety, but it is also highly conducive to injustice for the outsider. In fact it even smacks of star chamber litigation as FLM hearings are held in chambers. If FLMs could only make recommendations as to temporary orders rather issue temporary orders, which under our system have the same effect as a decretal order of a court, the situa-

tion might be somewhat more palatable. Unfortunately, that is not the case. The FOEA specifically provides them with such powers, but even then there would still be the problem in many cases as the FLM's salaries are paid by one of the two sides appearing before them.

Petitioner's counsel recognizes the United States Constitution does not in express terms prohibit one branch of state government from exercising powers conferred upon either of the other departments or branches, nor does the Constitution impose the separation of powers doctrine upon the states. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974); May v. Supreme Court of Colorado, 374 F.Supp. 1210, aff'd. 508 F.2d 136 (10th Cir. 1974), cert. den.

422 U.S. 1008, 95 S.Ct. 2631, 45 L.Ed.2d 671. Sound constitutional law, nevertheless, recognizes that executive officers cannot exercise or usurp judicial powers or functions, United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed 401 (1950). See also Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, cert dismd. 275 U.S. 486, 48 S.Ct. 27, 72 L.Ed. 387 (1927) holding any legislative act which clearly and manifestly exercises power properly belonging to the judicial department is unconstitutional. West Virginia jurisprudence echoes this strong tenet confirming that other branches of government cannot prevent the courts from exercising their innately judicial functions, State ex rel. Carnes v. Dadisman, 153 W. Va. 771, 782, 172 S.E.2d 561, 568 (1970), and the

legislature is without power to deprive a constitutional court of the authority bestowed upon it by the Constitution. Halltown Paperboard Co. v. C. L. Robinson Corp., 150 W. Va. 624, 628, 148 S.E. 2d 721, 724 (1966), states:

> "A constitutional court is not subject to legislative control unless specific authority is conferred upon the legislature by the Constitution."

No such constitutional authority has ever been granted to the West Virginia Legislature by the West Virginia Constitution for the creation and establishment of the FLM courts.

Looking closer at the FOEA one notes from its title it was not enacted by the Legislature solely for the purpose of creating a new domestic relations court system.

It was designed instead to get after dead beats who violate divorce and domestic relations orders, and almost as an afterthought it also created a new "judiciary" (family law masters) to assist the DHS in enforcing this grand plan, but by so doing it usurped divorce and other domestic relations matters from the hands and supervision of the West Virginia Circuit Courts which by the State Constitution have the exclusive duty as well as right to hear such matters. See W. Va. Const., Art. VIII, §6 providing that, subject to the supervisory control of the West Virginia Supreme Court of Appeals,

> "Circuit courts shall have the original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and costs, exceeds one hundred dollars unless such value or amount is increases by the legislative; of all cases in equity; . . . "

See also Art. VIII, §7 which although recognizing that the Governor may initially appoint circuit judges where vacancies exist, nevertheless, requires that Circuit Judges be elected by the citizenry (Family Law Masters are appointed for four year terms and are then subject to reappointment). Circuit judges in West Virginia must have been admitted to practice law in the State for at least five years prior to election or appointment, presumably to help assure some experience and expertise, but there are no minimum practice requirements for FLMs (See W.Va. Code §48A-4-1). The same statute also provides judges are to be paid out of the state treasury whereas FLMs are paid primarily by the DHS (W. VA. Code §48A-2-22) through funds churned up in the cases before them. The above cited Article

VIII, §7 also provides that judges' salaries may not be diminished during their term whereas there is no restraint to changes in FLM salaries. As a consequence it is not surprising to note the salaries of FLMs ($35,000) are significantly less than those of Circuit Judges ($65,000), and FLMs, unlike judges, are not precluded from other legal work which is not in conflict with their service (W. Va. Code §48A-4-1).

It is therefore submitted the W. Va. family law master system, whether or not intended, does in fact improperly circumvent West Virginia and federal constitutional requirements of due process and robs the citizenry of an independent, competent, disinterested, knowledgeable judiciary in matters of domestic relations which judiciary, according to the State Constitution,

must be elected.

2.

It is very important to understand that, although the wage withholding law requires that an order from a circuit court, magistrate or a court of competent jurisdiction of another state must first be obtained authorizing such withholding after notice of an administrative hearing and of a FLM hearing has been provided to the obligor, nothing in that law (Code 48A-5-3) states that FLM's temporary orders likewise qualify as a basis for wage withholding directives. It is also critical to note the notice provisions of Code § 48A-5-3 fail to require that written notice of the maximum amounts that can be withheld from an obligor's wages and of the exemptions to which the obligor is by law entitled be provided to the Em-

ployer, as well as the party under a duty of support, along with the other matters of which he or she must first be made aware before wage withholding can commence. This is a critical and fatal omission to the state act in question in view of the decisions discussed below.

Petitioner's counsel understands and appreciates the distinctions previously made by this court in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), the New York Court's rationale in the Martin decision cited below and the additional constitutional safeguards which should be present in prejudgment attachment matters as opposed to the usual post judgment enforcement procedures. Counsel is also mindful of this Court's pronouncements some time ago in Endicott Johnson Corp. v.

Encyclopedia Press, Inc., 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288 (1924) and Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946) for the proposition that the Fourteenth Amendment does not require that a judgment debtor be given notice and an opportunity to defend against a wage deduction proceeding to collect a debt that has been reduced to judgment. However, in the present case where the only "judgment" involved is one from an FLM, and it did not pertain to wage withholding, it is not correct to characterize such wage withholding as "post judgment relief" as the District and Fourth Circuit Courts have done for as of that time there had been no decree issuing from or approved by a circuit judge.

FLM's temporary orders can only then be described as a "bastard" procedure providing

rulings which, although effective unless and until set aside, and although displaying some aspects and vestiges of a judgment, nevertheless, do not qualify as a final reviewable order. Even assuming then arguendo the FLM system was constitutional, since FLM temporary orders are in the nature of short term temporary arrangements made by a nonjudicial arbiter, wage withholding procedures should not be based upon FLM's "temporary orders." Instead, wage withholding should be restricted only to orders issued from judges, or at least to FLM temporary orders which have been reviewed and ratified by a circuit judge as the Act appears to require.

As pointed out by the Third Circuit in Finberg v. Sullivan, 634 F.2d 50 (3rd Cir. 1980):

> "the [Endicott] Court did not consider the possibility that the garnishment might deprive the judgment debtor of exempt property."

Finberg, supra at 56,57.

As Burris v. Mahaney, 716 F.Supp. 1051, 1059 (M.D. Tenn. 1989) also indicates:

> "Since the Endicott era, federal and state legislation has created substantial limitations on what property may be garnished."

It is submitted that contrary to Endicott and Griffin there are much stronger reasons why constitutional due process hearing requirements should apply to wage withholding proceedings based upon domestic relations orders than to monetary judgments founded on contract or tort, whether they occur before or after an alimony or child support decree has been entered. Garnishment proceedings often occur years after the orders were entered which initially granted

alimony or child support, and considerable questions of evidence can thus arise (as was the case with your Petitioner) as to how much is properly due, and more recently how much of the obligor's income or assets are immune from such a seizure. Thus to allow Wickline to make this determination in house without regard to the rules of evidence and without any hearing falls woefully short of guarding a citizen's protected property rights.

It is submitted Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and the balancing test enunciated therein should apply and control in this case, and when the correlative rights of the parties are thus examined and balanced, the result must be that Petitioner should have been entitled to a court hearing which he

was denied prior to the involuntary taking of his wages.

3.

At this juncture Petitioner raises the withholding directive implemented against him (App. p. 143). Follette v. Vitanza, 658 F.Supp. 492 (N.D.N.Y. 1987), a case decided by the same court as Martin v. Supreme Court of New York, 644 F.Supp. 1537 (N.D.N.Y. 1986) discussed below but a year later, ruled New York state's post judgment enforcement statutes and rules were unconstitutional as violating due process procedural requirements because they failed to provide notice to the judgment debtor of the limits which could be suggested from his wages under the CCPA (15 U.S.C. §1673) and because the notice employed failed to afford plain-

tiff proper written notice of other protections afforded by the same Act including the right to challenge the intended withholding.

If Follette were applied to the facts in the case at bar the situation would be almost ludicrous. The withholding directive involved did notify Petitioner of his right to challenge the withholding which he did, but when he did the DHS and Wickline simply ignored him withholding his wages anyway despite the lack of any supporting hearing or order. On the other hand as occurred to plaintiff in Follette, Petitioner and his Employer were not provided any notice of the limits on the amount of withholding which could be implemented against Petitioner nor of any amounts that were immune from withholding as the Follette Court held was re-

quired in any such legislation and in the withholding directives issued thereunder if it was to meet the test of constitutionality. Counsel submits Follette is also highly apposite for this and a number of other evident reasons. The Follette Court indicates the rationale of Lugar, Sniadach, Fuentes and other cases on prejudgment attachments should, nevertheless, be applicable and carry over to post judgment enforcement procedures:

> " . . . the rationale underlying the holdings in these cases involving prejudgment attachments applies with equal force to actions by private parties pursuant to a State's post-judgment garnishment statutes. Just as in the cases involving prejudgment garnishments, the private defendants in this case did not simply pursue collection of a debt by private means permissible under New York law but instead invoked the authority of a public official--the enforcement officer of a local court--and compelled a

> garnishee to withhold pay from a judgment debtor at the threat of incurring personal liability for monies not withheld. *See* N.Y.C.-P.L.R. § 5231(e). This case is thus distinguishable from *Flagg Bros.*, where the Supreme Court held that conduct that is merely *consistent* with a body of law, whether statutory or decisional, does not without more amount to 'state action' when 'no state process of state officials were ever involved in enforcing that body of law.' 436 U.S. at 160 n. 10, 98 S.Ct. at 1735 n. 10."

Follette, supra, at 504.

The Court is also directed to Kirby v. Sprouls, 722 F.Supp. 516 (C.D.Ill. 1989), a class action case which held the Illinois garnishment procedures (surprisingly similar to those being employed in West Virginia) were unconstitutional as denying procedural due process. That case discusses Endicott and Griffin but holds the later decision of Mathews v. Eldridge is controlling and that

the application of the Mathews analysis and balancing test to the Illinois wage garnishment procedure required the conclusion that the statute violated procedural due process:

> "Although the defendant makes an arguable point about Endicott, I find that the Supreme Court's more recent pronouncement in Mathews has eroded the Endicott decision. Additionally, the Seventh Circuit, in a substantially similar context, indicated that it would follow the majority of courts that adopt the Mathews balancing test."

Kirby v. Sprouls, supra, at 520.

It is submitted the standard applied by the Third Circuit, the Illinois District Court and by the Seventh Circuit discussed therein, the Tennessee and New York District Court is totally at odds with that presently being followed in the Fourth Circuit as the Fourth Circuit has ignored any due process rights, and for that reason this Court

should assume jurisdiction if for no other reason than to resolve the issue and thus provide uniformity in the various circuits of the land.

> "The [state] circuit court in this case, however, entered a final divorce decree before the suggestion commenced. **we decline to expand settled law.**" [Emphasis added].

Roush v. Roush, not reported, page 4. No. 91-2539 (4th Cir. 1991). (App. p. 1).

Another federal decision discussed earlier herein requiring procedural due process in wage withholdings from another circuit is here again raised for the Court's consideration. Burris v. Mahaney, supra, involved wage garnishment under Tennessee law. In speaking of this Court's 1924 decision in Endicott the Burris Tennessee federal court at page 1060 of its opinion stated:

> "Since 1924, the Supreme Court has never again specifically addressed the issue of what procedural protections must be granted to a judgment debtor whose property is being garnished or otherwise seized. However, as pointed out by a number of lower courts when dealing with post-judgment garnishments or attachments of property, due process jurisprudence has undergone substantial development since 1924. See Finberg v. Sullivan, 634 F.2d 50, 57 (3rd Cir. 1980); Follette v. Vitanza, 658 F.Supp. 492, 510, 511 (N.D.N.Y. 1987); Dreary v. Guardian Loan Co., Inc., 534 F.Supp. 1178, 1185, 1186 (S.D. N.Y. 1982); Neeley v. Century Finance Co. of America, 606 F.Supp. 1453, 1461 (D. Arizona 1985); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F.Supp. 730, 732 (S.D. Ohio 1984).

The Court then went on to state that despite Endicott never having been overruled, the central approach to procedural process theory has long since shifted to the balancing approach set out by this Court in Mathews v. Eldridge, supra. The Fourth

Circuit has likewise failed to note or accept this shifting over to a balancing test and has also failed to note or concur with the numerous findings in other circuits of entitlement to procedural due process in post judgment garnishments and by its ruling the Fourth Circuit still appears to adhere to the 1924 Endicott rule.

It is clear from the above discussion of more recent federal decisions on point that obligors in post judgment garnishment proceedings such as Petitioner are minimally entitled to procedural due process and from comparing the procedures and language of the garnishment directives in those cases against the lack of procedure afforded Petitioner and the language of the withholding directive, West Virginia withholding procedures and written directives do not pass

muster, and this Court should find they do not afford, among other things, the necessary notice of rights and remedies and they lack both advice of maximum amounts that can be garnished and notice of the portion of the obligor's income which by law must remain immune from garnishment or other involuntary taking.

4.

Assuming arguendo when the Ex-spouse initially applied to the DHS for assistance thus initiating wage withholding procedures against her ex-husband that her motives were proper, and further assuming her request for child support for her son no longer living with her was at first excusable, her subsequent conduct shed her of any semblance or appearance of propriety. The Ex-spouse had a duty to report any overpayments she was

receiving just as social security and welfare recipients. Petitioner points out, and the evidence will confirm, the Ex-spouse was taking and keeping child support withheld at times when she did not even have the care of either one of her children. Judith Roush continued to insist upon and receive full support for her absent son taken from Petitioner's wages at the very same time she knew he was also paying support for this adopted son into the savings account he was "ordered" to establish by the FLM. Is this the conduct of an innocent actor?

Then take the situation where the daughter later went with her permission and knowledge and lived with her father for over half a year. During that period the Ex-spouse made no effort to advise the DHS of this nor to reduce or abate the ongoing wage

attachments against her ex-husband for such daughter's support. Is this likewise the conduct of an innocent actor?

Finally, take the situation when the son reached 18. Did Judith Roush advise the DHS of this? No way! That change and reduction was only accomplished by Petitioner's counsel many months later and then only after significant undeserved sums had been withheld from the Petitioner's wages and turned over to the Ex-spouse.

The above conduct is clearly that of one using and abusing established state procedures for private ends and illegal benefits, and it is this very conduct which caused the Ex-spouse Judith Roush to become a state actor thus answerable for damages in this proceeding. It is also this very conduct which draws one of the important

distinctions between Judith Roush and the ex-wife in Martin v. Supreme Court Of New York, supra, a case with somewhat familiar facts which would otherwise support the Ex-spouse's motion to dismiss had she been innocently invoking a statutorily provided mechanism for relief. One should also realize the Martin decision dealt with post judgment enforcement procedures, whereas in the case at bar we have an FLM's order where one not a judge is ruling on issues of property and affecting a citizen's property rights.

As to the culpability of Wickline and the DHS, these Respondents may not rely on the January 27, 1988 divorce decree or any of the other orders or FLM's recommended orders as a sufficient basis for their withholding against Petitioner as subsection

(14) of the FOEA (§48A-5-3[d]) requires a subsequent recommended decision specifically addressing the issue of withholding from the FLM confirmed by an order entered by the Circuit Court as to the propriety of the withholding before it can occur. This the Respondents never obtained nor sought after their bogus administrative hearing, and as recounted by Wickline in her deposition it is the practice at the DHS to bypass such hearings if they feel the withholding should proceed:

> A "Well, I told Anne Charnock that he wanted to take it before the Family Law Master and she said, 'Was there a mistake of fact,' and I went over the case.
>
> She said, 'There's no mistake of fact and there won't be a Family Law Master here, and there's no other court order signed by a judge.'

Wickline Discovery Deposition pp.14-15 (App. p. 162).

Respondent Wickline acting in total disregard of both the State and Federal law cited above, but at the same time under the color of the very laws she was disregarding, and against the advice and instructions of the FLM Steager, issued the withholding directive against Petitioner even before the April 7, 1988 FLM hearing date Petitioner was advised he was first entitled to have, notifying his employer on April 6, 1988, to initiate the withholding and of his wages. At the onset perhaps these actions might have been only negligent or a callous disregard of rights, but as of the time the Complaint was filed it had far surpassed the threshold and demarcation line of intent.

Admittedly under present law a monetary recovery is not possible against the DHS being an arm of the State. Will v. Michigan

Dep't. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). This is not to say, however, the DHS and Wickline in her official capacity are both not properly subject to prospective injunctive relief. By contravening state law (issuing a wage withholding without a hearing and order as prescribed by state law) Wickline lost the aegis of her cloak of immunity and exposed herself to personal liability in this 1983 action in which Petitioner sues her in both her personal and official capacities, for as the complaint indicates, Petitioner seeks not only monetary damages against Wickline and the DHS but also requests the Court to enjoin further state acts under the existing FOEA which clearly fails to afford procedural due process.

Last November this Court announced in

Hafer v. Melo, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 60 U.S.L.W. 4001 (1991) that state officials could be sued for monetary damages in 1983 actions in their personal capacities. Due to the timing of that decision with the briefing, argument and decision of the Fourth Circuit which issued several weeks later, it is believed the Fourth Circuit failed to consider or apply that decision.

Focusing for a moment on his Employer, Petitioner does not concede, as the Fourth Circuit has found, that his Employer "is not responsible". Without the Employer's actions and complicity in withholding his wages there might possibly have been no damages as Petitioner's wages would have been intact. The Employer's actions are therefore the sine qua non without which we

would not be here. Federal case law advises that negligent deprivation of property without due process by itself can state a cause of action under 1983 (See Brewster v. Pike, 608 F.Supp. 1163 [W.D. Va. 1985], aff'd in part, rev'd in part and remanded 788 F.2d 985 [4th Cir. 1986]), and it might well be that a jury would find at least culpable negligence on the part of the Employer for its nonfeasance in failing to take steps to discontinue and/or to reduce the usurious withholding or find misfeasance or malfeasance by withholding more on a weekly basis than the CCPA permits.

At this juncture some of Respondents' acts have to be conscious and intentional in that the Ex-spouse must know she has received more than she is entitled for support and alimony, and Wickline, the DHS and the

Employer must all be charged with knowledge of the statutes they are consciously violating. Does a claimant have to prove governmental agencies and their employees must be aware of the language of the very statutes they are charged with enforcing?

This Court has held the right to enjoy property without unlawful deprivation, no less than the right to speak or right to travel, is in truth, a personal right, whether the property in question be pay checks, welfare checks, a home or a savings account. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 111, 31 L.Ed.2d 424 (1972), reh. den. 406 U.S. 911, 92 S.Ct. 1611, 31 L.Ed.2d 822, on remand 360 F.Supp. 720. As a consequence when a significant portion of a persons's weekly pay check is garnished against his will under color of a

void administrative withholding directive issued in contravention of the very statute which authorizes it, Petitioner has no problem in establishing a prima facie case against all of the Respondents including his Employer. Follette v. Vitanza, supra, confirms that judgment creditors such as the Ex-spouse and nonimmune state employees who assist them (Wickline) who issue income executions or withholding directives are "State Actors" for 1983 purposes by virtue of the joint action test where the authority of a public official is invoked to compel a garnishee to withhold pay for a judgment debt.

In this case the Employer cannot deny knowledge on its part as to the invalidity of the administrative garnishment order as it was advised a number of times both in

writing and verbally to that effect by Petitioner and his counsel. Then, even if it could successfully plead ignorance on that score, how can the Employer evade scienter of the excessive amounts directed to be withheld by the DHS (of which it was aware and even advised Petitioner). Also how can it avoid responsibility for its intermittent withholding of much more than fifty-five percent of plaintiff's weekly wages in violation of the wage withholding sections of the FOEA, the West Virginia CCPA and the federal CCPA even after being advised of this impropriety by Petitioner and his counsel?

Improper garnishment, attachment and/or withholding procedures under state law constitute acting "under color of law" and when they are used to deny due process and

result in the illegal seizure of a citizen's property they become recognized areas of legitimate concern for 1983 actions such as the case sub judice. See Coltharp v. Cutler, 419 F.Supp. 924 (C.D. Utah 1976); McMeans v. Schwartz, 330 F.Supp. 1397 (S.D. Ala. 1971). Misuse of power by state officials such as Wickline in prosecuting the void administrative garnishment order (Brown v. Miller, 631 F.2d 408 [5th Cir. 1980]) is likewise a recognized basis for a 1983 action, as is concerted or joint action with state officials by private persons (Ex-spouse) who permitted the garnishments to continue and accepted the monies therefrom necessarily knowing the DHS/Wickline had oversuggested and that she was being overpaid. These facts when adduced at trial would clearly support a §1983 cause of

action. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). See also McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th Cir. 1976), cert. den. 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131, holding that joint conduct by state and private persons is sufficient to support a finding that private parties are acting with state officials in unlawful conduct under color of law if the public and private parties act with a common understanding or a meeting of the minds. Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) holds that when private persons (Ex-spouse and Employer) engage in prohibited conduct with nonimmune state officials (Wickline), they are acting under color of law for purposes of 1983 actions.

One essential requirement of a 1983 action is that the defendants, at the time

they acted, knew or, as a reasonable person, should have known that such acts were ones that would deprive the Petitioner of his constitutional rights or might lead to that result. Bowens v. Knazze, 237 F.Supp. 826 (N.D. Ill. 1965). Some courts suggest one yardstick to be applied to governmental defendants is a "professional judgment" standard under which the government worker is legally responsible in 1983 actions where they exercised unprofessional judgment. Other courts apply what appears to be a higher "deliberate indifference" standard as to governmental employees in 1983 actions under which they are liable only if the actor failed to provide adequate protection and was recklessly indifferent or grossly negligent, if not actually deliberately or intentionally indifferent regarding a

citizen's rights. Shaw by Strain v. Stackhouse, 920 F.2d 1135 (3rd. Cir. 1990). It would be helpful if this Court "standardized" the test which should be applied in such instances but the quintessence of either standard appears to be recklessness by a state actor which triggers the protections of due process for the purposes of 1983 actions (Gregory v. City of Rogers, Ark., 921 F.2d 750 [8th Cir. 1990]).

In the case at bar the reckless, deliberate and indifferent acts of Wickline and the DHS as to Petitioner's rights are glaringly present, and regardless of which standard is followed these actors should be held accountable, Wickline in money damages and both by prospective injunctive relief. When the District Court ruled below it was not aware of the blatant and continuing

practices of Wickline and DHS personnel in ignoring Petitioner and other obligor's hearing rights when they personally feel there is no sufficient mistake of fact as Wickline's deposition glaringly reveals. That deposition was taken a few weeks before the District Court decision and under local Court Rules such depositions are not filed with the Court unless brought to the Court's attention by counsel.

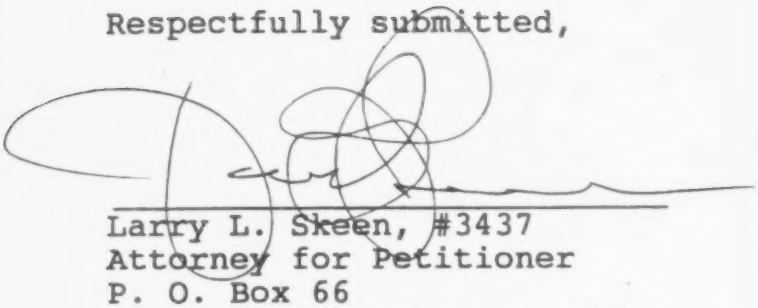
Conclusion

Based upon the authorities and argument above Petitioner submits: the West Virginia Family Law Master system is unconstitutional as improperly wresting from West Virginia constitutional circuit courts the domestic relations cases over which they have by our State Constitution the sole and exclusive authority and duty to judge; Mathews v.

Eldridge controls the present controversy and when the various rights are balanced as that case directs your Petitioner does or did have the right of due process and of an entitlement hearing before his wages were withheld (garnished) which right was denied; Petitioner was not afforded procedural due process as he was denied a hearing although requested before the withholding commenced and the withholding directives implemented against him and his employer did not meet or contain the language requirements which the various federal courts discussed in that section deem necessary in order to afford procedural due process; Petitioner made out a prima facie case against all or some respondents for prospective or injunctive relief and made out a prima facie claim, at least against the Ex-Spouse, Wickline and

the Employer, for monetary relief if the Fourth Circuit would have applied Hafer v. Melo which it did not; and finally the District and Fourth Circuit should have retained jurisdiction of Petitioner's claim for respondents' violation of the maximums amounts that could be taken from his wages under both the Federal and State Consumer Credit Protection Acts. Petitioner therefore requests this Court to declare the Enforcement of Family Obligations Act or the portions thereof argued above as unconstitutional and lacking both substantive and procedural due process, to enjoin the further application of such laws and to reverse the District and Fourth Circuit Courts remanding this matter back with appropriate directions.

Respectfully submitted,



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Certificate of Service

In accordance with Rule 28 of the Rules of the United States Supreme Court, I hereby certify that I have this 16th day of March, 1992 filed the required copies of the brief in the Clerk's office and have mailed the required copies of the brief to:

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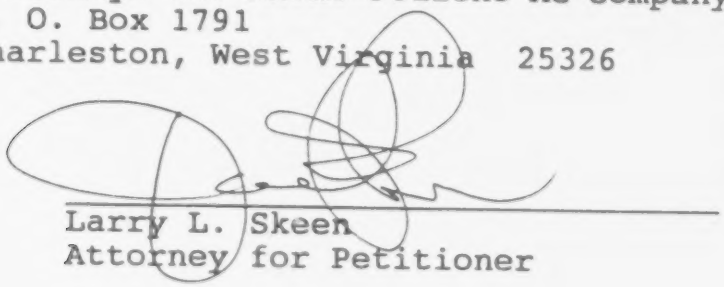

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Supreme Court, U.S.
FILED
MAR 16 1992
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91-1512

NO.

IN THE

Supreme Court of the United States

October Term, 1991

RODNEY D. ROUSH, Petitioner

vs.

JUDITH ANNETTE ROUSH, BETTY WICKLINE, The STATE OF WEST VIRGINIA, Acting Through Its DEPARTMENT OF HUMAN SERVICES, and RHONE-POULENC AG COMPANY, a Pennsylvania corporation, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. ROUSH, Plaintiff-Appellant v. JUDITH ANNETTE ROUSH; BETTY WICKLINE; STATE OF WEST VIRGINIA, ACTING THROUGH ITS DEPARTMENT OF HUMAN SERVICES; RHONE-POULENC AG COMPANY, A PENNSYLVANIA CORPORATION, Defendants-Appellees	)	No. 91-2539

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
Charles H. Haden, Chief District Judge.
(CA-90-912-2)

Argued: October 29, 1991

Decided: December 18, 991

Before RUSSELL, Circuit Judge, CHAPMAN, Senior Circuit Judge, and WARD, Senior United States Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Larry Lynn Skeen, SKEEN & SKEEN,

Ripley, West Virginia, for Appellant. William Randolph Fife, STEPTOE & JOHNSON, Charleston, West Virginia; Michael B. Victorson, ROBINSON & McELWEE, Charleston, West Virginia, for Appellees. ON BRIEF: Daniel R. Schuda, STEPTOE & JOHNSON, Charleston, West Virginia; Christopher B. Power, ROBINSON & McELWEE, Charleston, West Virginia; Michele Grinberg, KAY, CASTO, CHANEY, LOVE & WISE, Charleston, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Rodney Roush appeals the district court's order dismissing his actin under 42 U.S.C. §1983 against each defendant for failure to state a claim upon which relief can be granted. We affirm.

In 1986, Mrs. Roush initiated a divorce action against Mr. Roush in West Virginia Circuit Court. Pursuant to the Family Obligations Enforcement Act of 1986, W. Va. Code §48A (1986 & Supp. 1991),* a Family Law

Master ("FLM") heard the case. On January 27, 1988, the circuit court entered a final divorce decree which established alimony payments of $400.00/month and child support payments of $15.00/month for each of the two children. At a subsequent hearing, the FLM found that Mr. Roush was in arrears in the amount of $880.00.

In late March 1988, Betty Wickline of the Child Advocate Office of the Department of Human Services ("DHS") sent Mr. Roush written notice that a suggestion

---

*The opinion of the district court quotes sections of the West Virginia Code from various years. The substance of the quoted sections, however, has not changed. Amendments have merely renumbered the pertinent sections or added minor stylistic changes. Therefore, for the sake of simplicity, we will cite only to the 1986 version as amended in 1991.

[garnishment] of his wages at Rhone-Poulenc AG Company ("Rhone-Poulenc") would be commenced in the amount of the current monthly obligation plus ten percent to discharge the arrearage. Pursuing his state law remedies, Mr. Roush appeared at a scheduled meeting with the Child Advocate Office to contest the facts warranting the suggestion and also its amount. *See id.* §48A-5-3(c)(10), (11), (12). The parties could not resolve their differences, and as required by state law, a hearing before the FLM was scheduled for the next day. Only Mr. Roush appeared at the hearing, and the FLM took no action toward implementing the suggestion. Although state law requires a recommended order from the FLM and a confirmed order from the circuit court, the Child Advocate Office commenced the suggestion through notice to the employer without receiving the proper authority. Mr. Roush claims that this action deprived him

of his opportunity to make his objections known before the circuit court.

In addition to the denial of a hearing, Mr. Roush complains of numerous delays by the Child Advocate Office in correcting the suggestion due to changed circumstances. Specifically, the children at times did not live with Mrs. Roush, and the ten percent suggestion continued despite the curing of the arrearage. Mr. Roush successfully moved the circuit court to terminate the suggestion, but, on appeal, the West Virginia Supreme Court of Appeals reversed and remanded the case for reinstatement of the suggestion.

A. Mrs. Roush

Mr. Roush asserts that Mrs. Roush acted under color of state law to deprive him of his federal constitutional rights by initiating with the DHS and Wickline the wage suggestion and thereby violated 42 U.S.C. §1983. In essence, he complains that

Mrs. Roush, in concert with the other defendants, deprived him of his right to certain property, his wages, without a hearing in violation of the due process clause.

In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Supreme Court stated: "[W]e do not hold today that 'a private party's mere invocation of state legal procedures constitutes joint participation or conspiracy with state officials satisfying the 1983 requirement of action under color of state law.'" Id. at 939 n.21. The Court limited its holding to prejudgment attachment hearings. Id. The circuit court in this case, however, entered a final divorce decree before the suggestion commenced. We decline to expand settled law. Mrs. Roush was merely pursuing remedies available under West Virginia law, and although certain state employees are alleged to have assisted her, this is not sufficient

to satisfy §1983.

B. DHS

In Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989), the Supreme Court held that a "State is not a person within the meaning of §1983." Id. at 64. Furthermore, the Court noted that "our holding ... applies only to states or governmental entities that are considered 'arms of the State.'" Id. at 70. The DHS, as an arm of the stat,e therefore, cannot be sued under §1983.

C. Wickline

Likewise, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . As such, it is no different from a suit against the State itself." Id. at 71. Hence, Wickline, alleged to be acting in her official capacity as an employee of the DHS, cannot be sued under §1983.

D. Rhone-Poulenc

Mr. Roush asserts that his employer, Rhone-Poulenc, had a duty to ignore the suggestion order where the suggestion exceeded the maximum allowed by law of his total income. We find no such duty, because the suggestion order is binding on the employer, and Rhone-Poulenc could, therefore, be liable for any amount not suggested from Mr. Roush's wages. W. Va. Code §48A-5-3(j),(n)(Supp. 1991). Mr. Roush also argues that Rhone-Poulenc acted in concert with the other defendants to violate his rights under §1983. For the reasons stated in Part A, we find no merit to this argument.

AFFIRMED

UNITES STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

RODNEY D. ROUSH,

Plaintiff,

vs. CIVIL ACTION NO. 2:90-0912

JUDITH ANNETTE ROUSH, et al,

Defendants

MEMORANDUM OPINION AND ORDER

On September 5, 1990, Plaintiff Rodney D. Roush (Mr. Roush) filed his complaint against the Defendants alleging that they improperly suggested his wages pursuant to W. Va. Code, §48A-1-1, et seq. (West Virginia Enforcement of Family Obligations

Act). The named Defendants include Judith Annette Roush (Mrs. Roush), Mr. Roush's ex-wife; the West Virginia Department of Human Services (DHS); Betty Wickline (Wickline), a paralegal with DHS; and Rhone-Poulenc Ag Company (RP), Mr. Roush's employer.

Mr. Roush charges that RP (1) acted in concert with the other Defendants by illegally and/or unconstitutionally suggesting Mr. Roush's wages; and (2) suggested and continues to suggest "an illegally high and usurious amount"[1] from Mr. Roush's weekly net income. RP has responded by filing a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Mr. Roush thereafter filed a memorandum of law in opposition, to which RP has replied. Accordingly, this matter is now mature for the Court's attention.

The allegations made in Mr. Roush's

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[1]Plaintiff's complaint, Count Four.

complaint and responsive memorandum are taken as true for purposes of this motion.

In 1986 Mrs. Roush initiated a divorce action against Mr. Roush in the Circuit Court of Kanawha County, West Virginia (Civil Action No. 86-C-2783). The issues in contest were heard by Kanawha County Family Law Masters Merille Steiger (Steiger) and William Tantlinger (Tantlinger). On February 11, 1987, Steiger entered a recommendation/order confirming that Mr. Roush was in arrears in his support alimony obligations in the amount of $925.00. Steiger granted Mrs. Roush a judgment in that amount and ordered that Mr. Roush pay Mrs. Roush $100.00 per month in discharge of the arrearage in addition to his current monthly support obligation of $450.00.[2]

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[2]Mr. Roush, therefore, meets the statutory definition of an "obligor" pursuant to W. Va. Code, §48A-1-3(16).

A final divorce decree was entered on January 27, 1988. This decree awarded monthly child support and alimony to Mrs. Roush in the amounts of $300.00 and $400.00 respectively. At a hearing of February 16, 1988, Tantlinger found that Mr. Roush had paid $45.00 of the $925.00 arrearage but remained in arrears in the sum of $880.00. Tantlinger also noted that Mrs. Roush's son, who Mr. Roush had adopted during their marriage, had left Mrs. Roush's custody and returned to live with his natural father in North Carolina. As a consequence, Mr. Roush's child support obligation for his son was reduced from $150.00 to $50.00 per month. Mr. Roush, however, was ordered to establish a special savings account in the name of his adopted son and to make monthly $100.00 deposits therein.

Several days after March 22, 1988, Mr. Roush received a written notice from the child advocate's office of the DHS through

Betty Wickline that a suggestion of his wages was being commenced in the amount of $700.00 per month, composed of $300.00 per month in child support ($150.00 per month per child for the adopted son and the daughter) and $400.00 per month in alimony. This notice also advised Mr. Roush that an additional 10% of his wages would be suggested to reduce a $400.00 arrearage. Mr. Roush was further advised that this suggestion would occur unless she requested a meeting with the child advocate office within fourteen days, and that if the meeting with the child advocate office failed to resolve any contested mistakes of fact, a hearing on the proposed suggestion would be conducted by the family law master.

Mr. Roush responded by making the appropriate request for a hearing, and on April 6, 1988, he appeared to object to the notice of suggestion. Mr. Roush's objections were not resolved at this

meeting. Mr. Roush next appeared with his counsel, Joseph Zak, on April 7, 1988, t a hearing before Steiger. The DHS, Wickline and Mrs. Roush all failed to appear for the April 7, 1988, hearing. Accordingly, no action was taken by Steiger on the request for wage suggestion. Moreover, at the conclusion of the April 7, 1988, hearing, Steiger telephoned "someone at DHS"[3], believed to be its counsel, Ann Charnock, and advised her that DHS could not suggest Mr Roush's wages under such circumstances. Nevertheless, DHS began suggesting Mr. Roush's wages through RP pursuant to the

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[3]Plaintiff's complaint, Count One, p. 6.

notices of suggestion.[4] Moreover, after Mr. Roush's adopted son reached 18 years of age, DHS continued to suggest Mr. Roush's wages for the son's support until the agency finally responded to Mr. Roush's repeated written demands to reduce the suggestion to $550.00 per month plus 10% toward a nonexisting arrearage.

In August of 1988, the Roushes' daughter left Mrs. Roush's custody and

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[4]Mr. Roush, therefore, alleges that DHS was suggesting $150.00 per month from his wages for his adopted son's support rather than the proper $50.00 per month figure, while at the same time he was required to deposit, and was depositing $100.00 per month in the special savings account as ordered by the court. As a result, over the following eight months, the suggestion of Mr. Roush's wages resulted in an overpayment to Mrs. Roush for child support in an amount of $800.00 thus resulting in a possible delinquency or arrearage of $80.00.

resided with Mr. Roush until April 11, 1989.[5] Nevertheless, the suggestion against Mr. Roush including his daughter's support continued during the period in which his daughter resided with Mr. Roush.

As a result Mr. Roush moved the Kanawha County Circuit Court to terminate any further suggestion of his wages. By an order entered August 23, 1989, the Honorable John Hey, Judge, ruled that Mr. Roush:

> "...has previously paid all such arrearage and is now in fact owed a credit thereon which, according to the Department of Human Services, amounts to $121.15. The court, therefore, orders that such suggestion be dismissed and discharged and a copy of this order is to be delivered to the West Virginia Department of Human Services as evidence of the

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[5]Accordingly, Mr. Roush claimed he was entitled to a credit against his duty of support of $150.00 per month for eight months, totalling $1,200.00. This credit was later recognized at hearings before Tantlinger and Kanawha Circuit Judge John Hey, as Michele Grinberg, Mrs. Roush's legal counsel, stipulated that Mr. Roush had overpaid Mrs Roush in the amount of $121.15.

court's ruling in this regard."[6]

A Supreme Court of Appeals decision prohibited Judge Hey from further proceedings and remanded the case for reinstatement of child support and alimony. Judith R. v. Hey, Judge, ___ W.Va. ___, ___ S.E.2d ___ (Filed July 26, 1990 - yet unpublished). Thus, the suggestion upon Mr. Roush's wages continues unabated despite his

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[6]Judge Hey sparked national attention in his memorandum opinion and order by further ruling that:

> "[Mrs. Roush] and are daughter are currently living n a home with a man to whom [Mrs. Roush] is not married, and the court will not permit such child to remain in her mother's custody nor condone such circumstances. The Court, therefore, grants [Mrs. Roush] thirty days from the date of this hearing in which either to marry such man or to move out and establish separate living arrangements for her and her daughter. If neither alternative condition is met within such thirty day period the court grants custody of [the Roushes' daughter to Mr. Roush]."

repeated complaints, demands and requests to Defendants to cease collection.

Chapter 48A, Article 2 of the West Virginia Code provides for the West Virginia Child Advocate Office, which is directed, *inter alia to* "...pursue the enforcement of support orders through the withholding from income of amounts payable as support ..." W. Va. Code, §48A-3-3(f). In addition, Article 5 of the Enforcement of Family Obligations Act provides that "the withholding from an obligor's income of amounts payable as spousal or child support shall be enforced the children's advocate in accordance with the provisions of this section." W. Va. Code, §48A-5-3(a). The children's advocate is involved in all procedures for collection of child and spousal support arrearages and is responsible for the enforcement of child and spousal support orders which provide for immediate income withholding. W. Va. Code,

§§48A-5-3(d); 48A-5-2(e); 48-2-15a; 48-2-15b.

W. Va. Code, §48A-1-3(19) defines "source of income" as an employer or successor employer of any other person who owes or will owe income to an obligor. RP, as Mr. Roush's employer, is, therefore, a source of income As part of the Child Advocate Office's enforcement powers, W. Va. Code, §48A-5-3(f) provides as follows:

> "The source of income of any obligor who is subject to withholding, upon being given notice of withholding, shall withhold from such obligor's income the amount specified by the notice and pay such amount to the child advocate office for distribution in accordance with the provisions of Section 4, Article 3 of this chapter. The notice given to the source of income shall contain any such information as may be necessary for the source of income to comply with the withholding order."

In order to determine the amounts which may be withheld, the Child Advocate Office must, *inter alia*, "ascertain the status of

the payment record of the obligor;" review of the terms of the support order; examine the payment record to determine whether any arrearages are due; determine whether or not the obligor is supporting another spouse of dependent child other than the spouse or child for whom the proposed withholding is being sought; determine the amount of the obligor's "earnings," "disposable earnings" and "income" under precise statutory definitions; and consider whether the obligor has purposefully acted to minimize his or her income. W. Va. Code, §§48A-5-3; 48A-1-3.

The notice given to the source of income shall advise the source of income that the amount to be withheld from the obligor's income may not exceed the maximum amounts permitted under Section 303(b) of the Federal Consumer Credit Protection Act, W. Va. Code, §48A-5-3(f)(1).

Also, the source of income is required

by law to send the specified amount to the Child Advocate Office within ten days of the date the obligor is paid. W. Va. Code, §48A-5-3(f)(2). The required withholding must take place no late than the first pay period or first date of payment of income which occurs within fourteen days following receipt of the notice of withholding. W. Va. Code, §48a-5-3(f)(9). W. Va. Code, §48A-5-3(h) provides that: "A source of income must send the amount to be withheld from the obligor's income to the child advocate office."[7] Withholding of amounts payable as support is binding on the source of income until further notice of the Child Advocate office, W. Va. Code, §48A-5-3(j). As an additional enforcement power, W. Va. Code, §48A-5-3(n) provides that:

[7]The director of the Child Advocate Office shall, "by administrative rule, establish procedures for promptly refunding to obligors amounts which have been improperly withheld." W. Va. Code, §48A-5-3(g).

> "A source of income is liable to an obligee, including the state of West Virginia and the Department of Health and Human Resources, where appropriate, for any amount which the source of income fails to withhold from income due an obligor following receipt by such source of income of proper notice under subsection (f) of this section..."

W. Va. Code, §48A-5-3(d)(12)(13) and (14) provide that if the obligor contests the notice of suggestion, he may meet with the children's advocate office to attempt to settle the contested issue. And, if this meeting fails to resolve the contested issues, then:

> "A hearing before the family law master will be held at a time and place set forth in the [suggestion] notice, and that following such hearing, the master will make a recommended decision to the circuit court; and that a master's recommended decision as to withholding will become effective when it is confirmed and an order is entered by the circuit court; and that if the obligor disagrees with the master's recommended decision, he or she will be given the opportunity to make objections known to the circuit court."

(Emphasis supplied).

Mr. Roush contends that since (1) he objected to the notice of suggestion; (2) the objections were not resolved by a meeting with the children's advocate office; (3) he appeared before Family Law Master Steiger the following day as scheduled; (4) no one on behalf of the children's advocate office attended this hearing; and (5) because Steiger did not make a recommendation that the suggestion should proceed,[8] Defendants may not rely on the January 27, 1988, divorce decree as law foundation for the suggestion of Mr. Roush's wages. Thus, the gravamen of Mr. Roush's claim against RP, as stated in his responsive memorandum, is:

> "[F]irst that there was never any order issued by any court, let alone a court of competent jurisdiction, upon which his employer

[8]In fact, Mr. Roush alleges that Steiger actually advised the DHS that it could not suggest Mr. Roush's wages.

could rely and continually suggesting [Mr. Roush's] wages as [RP] has done in the past and continues to do at present. Second, even if [RP] pleads initial ignorance of this fact and, therefore, no culpability at the onset, after [Mr. Roush] and his counsel objected to [RP] on a number of occasions, both verbally and in writing raising the fact that there was never an order entered after [Mr. Roush's] objections and hearings which confirmed DHS's ...and Betty Wickline's right and responsibility to suggest [Mr. Roush's] wages, at least at the point in time, when they were informed of the situation, and were also aware from their own records that excessive amounts were being garnished by the DHS and [Mrs. Roush], as well as the fact that more than the maximum fifty or fifty-five percent of [Mr. Roush's] weekly disposable wages were being garnished as to some weeks, [RP] was then under a duty to investigate and upon confirmation to cease such illegal, improper and excessive garnishment and to advise the DHS of the reason therefor."[9]

I

Mr. Roush has not alleged that RP had any role in the initiation of the suggestion

[9]Plaintiff's responsive memorandum, p.2.

of his wages, or that it took part in the hearings held to determine whether the suggestion should continue. Nor has Mr. Roush asserted that RP did anything inconsistent with the notice orders it received. Apparently, Mr. Roush alleges that RP is liable along with the other named Defendants solely for honoring the notice of suggestion which may have required RP to suggest Mr. Roush's wages improperly. Implicit in his complaint is that RP owed an affirmative duty to Mr. Roush not to honor the suggestion notice.

The West Virginia Legislature vested the Child Advocate Office with complete responsibility for enforcing child and spousal support orders,and granted it the power to require suggestion of wages as a means of accomplishing that goal. By law, a source of income which receives such a notice from the DHS must either (1) withhold the specified amount stated in the notice,

or (2) become liable to an obligee for the same amount. RP, therefore, was under a legal duty to honor the notices which it received from DHS with regard to the suggestion of Mr. Roush's wages "until further notice by the Child Advocate Office." See W. Va. Code, §48A-5-3(j).

Under the foregoing statutory scheme, the Court holds a source of income is under a mandatory obligation to comply with a notice requiring income withholding. As such RP has no discretion to object to the method by which the amount is calculated or the procedures used in issuing such a notice.

Alternatively Plaintiff believes he has a cause of action against RP for a claimed violation of 42 U.S.C. §1983.[10] In this

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[10]Plaintiff's responsive memorandum, p. 9; plaintiff's complaint, Count Two, paragraph 7.

regard Mr. Roush cites Lynch v. Household Finance Corp., 405 U.S. 538, rehearing denied 406 U.S. 911 (1983) for the proposition that the right to enjoy property without unlawful deprivation is a personal right, whether the property in question be paychecks, welfare checks, a home or savings account.[11] Mr. Roush thus asserts that he has a prima facie case against his employer where a significant portion of his weekly paycheck is garnished under color of a void garnishment order. The Court does not read Lynch as being this broad because an employer's liability was not at issue in Lynch.

Mr. Roush next asserts that:

> "Improper garnishment and/or attachment procedures under state law constitute acting 'under

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[11]In Lynch, the plaintiff filed a declaratory judgment action requesting a ruling by the court that the statute permitting the garnishment of plaintiff's savings account was unconstitutional.

> color of law' and when [such procedures are engaged in by the defendants, including RP], to deny due process and result in the illegal seizure of a citizens property they become recognized areas of legitimate concern for 1983 actions...[12]

In support of this contention, Mr. Roush cites Coltharp v. Cutler, 419 F.Supp. 924 (D. Utah 1976); and McMeans v. Schwartz, 330 F.Supp. 1397 (D. Ala. 1971). Coltharp involved allegations of abuse of process followed by the alleged use of an unconstitutional garnishment statute. In Coltharp, however, the plaintiff's section 1983 claim was dismissed. In McMeans, the defendant filed suit against plaintiff claiming that plaintiff was indebted to him. Contemporaneously, a prejudgment garnishment was taken on plaintiff's wages pursuant to the Code of Alabama. The plaintiff's employer, however, was not named as a

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[12]Plaintiff's responsive memorandum, p. 10.

defendant. As in the present action, the employer in McMeans did nothing more than properly obey the legal process. The holding in McMeans, therefore, is inapplicable to RP's motion to dismiss. In summary, Mr. Roush cannot establish in law that he has been unlawfully deprived of a property right by RP.

Mr. Roush next relies on Dennis v. Sparks, 449 U.S. 24 (1980) and McNally v. Pulitzer Pub. Co. et al, 532 F.2d 69 (8th Cir. 1976), cert. denied, 429 U.S. 855 (1976), as holding that joint conduct by state and private persons is sufficient to support a finding of unlawful conduct under color of law if the public and private parties act with a common understanding or meeting of the minds. In Dennis, the court acknowledged that private persons, jointly engaged with state officials are acting under color of law for purposes of Section 1983 actions. The issue in Dennis was

whether private persons could act under color of law where the state action with whom they were charged with conspiring was a judge who was immune from liability in a Section 1983 suit. This case, however, has no bearing on whether one in the position of RP has acted under color of law.

In McNally, an inmate of a federal penitentiary brought a civil rights action against various prison officials and a newspaper publisher and reporter seeking damages and injunctive relief as well as a permanent injunction against the reporter and publisher for publishing a newspaper article quoting several portions of a psychiatric report. There, the court held that when private and public parties act with a common understanding or meeting of the minds, the private parties are acting under color of law for purposes of 42 U.S.C. §1983. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). As stated above,

however Mr. Roush has not alleged that RP played any role in the suggestion of his wages other than simply honoring the suggestion orders as it was required to do by law. Thus, Mr. Roush has filed to allege that RP had a common understanding or meeting of the minds with any state actors. Instead, Mr. Roush's complaint merely asserts that RP acted "in concert with the other defendants." More conclusory allegations of this nature will not suffice.

The complaint in Grow, *Id.*, was similar to the instant complaint in that it alleged only that private individuals acted "in concert" with state officials. In evaluating this allegation upon a motion to dismiss for failure to state a claim against the individual defendants, the court held that the charge was not sufficiently specific to support a claim of conspiracy under 42 U.S.C. §1983. The court opined:

"Even if we were to assume...that

> the 'in concert' allegation was sufficiently specific to support a claim of conspiracy, there still must be some basis more than mere conclusory allegations that there was an agreement under color of state law to violate the plaintiff's constitutional rights, privileges or immunities."

Grow, supra, at 878-79. See also Martin v. Supreme Court of State of New York, 644 F.Supp. 1537 (N.D. N.Y. 1986) ("assertion of a conspiracy in a Section 1983 action must be pleaded with specificity," and where "there s nothing more in the complaint than the allegation that [the defendant] employed the statutorily provided mechanisms for registration of, and execution on, a judgment," the complaint is insufficient.)

As stated above, DHS has as one of its chief tools in the enforcement of child and spousal support orders the right to issue a notice of withholding to any of Mr. Roush's sources of income -- including RP. Because Mr. Roush was in arrears as to support

obligations he owed to Mrs. Roush, the children's advocate office served RP with suggestion orders. RP, however, is not and was not a party to any of the resulting administrative and/or judicial hearings. RP was a "source of income" because it was Mr. Roush's employer. In accordance with state court and DHS orders, RP did precisely what was required of it by law. Mr. Roush does not allege that RP acted other than in accordance with the notices it received. Instead he asserts that after RP was advised by Mr. Roush of the "defective and/or bogus garnishment order"[13] it was under a duty to make an independent determination as to the validity of each and every such notice prior to honoring it. As previously discussed, the Court does not agree. The Enforcement of Family Obligations Act does not create such a duty, and Mr. Roush has failed to

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[13]Plaintiff's Responsive memorandum, p. 5.

offer any other authority which would impose such a duty. Thus, the Court concludes that Mr. Roush's complaint, to the extent that it charges RP with illegally and/or unconstitutionally suggesting Mr. Roush's wages, fails to state a claim upon which relief can be granted. Accordingly, Counts One, Two and Three of Mr. Roush's complaint are dismissed as to RP.

II

Mr. Roush's complaint also charges that even if the suggestion of his wages was proper, RP is liable "for suggesting an illegally high and usurious amount" from his weekly net income.[14] Mr. Roush asserts that RP has systematically taken more from his wages on a weekly basis than that permitted by statute.

In order to determine the amounts which

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[14]Plaintiff's complaint, Count Four, paragraph 13.

may be withheld from an obligor's income, the Child Advocate Office must (1) ascertain the status of the payment record of the obligor under the terms of the support order; and (2) examine the payment record to determine whether any arrearages are due for amounts which should have been paid prior to a twelve-week period which ends with the worksheet for which withholdings is sought to be enforced. W. Va. Code, §48A-5-3(e)(1). Then, if none of the withholdings is for amounts which came due prior to such twelve-week period, then:

> "When the obligor is supporting another spouse or dependent child other than the spouse or child for whom the proposed withholding is being sought, the amount withheld may not exceed fifty percent of the obligor's disposable earnings for that week."

W. Va. Code, §48A-5-3(3)(2)(A). However, if a part of the withholding is for amounts which came due prior to such twelve-week period, then:

> "Where the obligor is supporting another spouse or dependent child other than the spouse or child for whom the proposed withholding is being sought, the amount withheld may not exceed fifty-five percent of the obligor's disposable earnings for that week."

W. Va. Code, §48A-5-3(e)(3)(A).

W. Va. Code, §48A-1-3(9) defines "earnings" as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise," and defines "disposable earnings" as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld." The definition of "earnings" and "disposable earnings" are not confined to income received from any one employer of an obligor. Thus, the percentage limitations on amounts which may be withheld under the Act would not necessarily apply to the wages Mr. Roush receives from RP, but instead, would apply

to Mr. Roush's total disposable earnings. Presumably, RP wold have no knowledge of Mr. Roush's total disposable earnings. Nor would RP have the ability, obligation or right to inquire into Mr. Roush's income sources or to seek information relative to his financial obligations in order to ascertain this figure.

Furthermore, W. Va. Code, §48A-5-3(3)(6) provides that:

> "If an obligor acts so as to purposefully minimize his or her income...the amounts to be withheld as support payments may be based upon the obligor's potential earnings rather than his or her actual earnings, and such obligor may not rely upon the percentage limitations set forth in this subsection which limit the amount to be withheld from disposable earnings."

Again, RP has no ability or right to investigate whether Mr. Roush has acted to purposefully minimize his income under the Act.

In his responsive memorandum, however,

Mr. Roush reasserts the argument that because RP was informed that excessive amounts were being garnished from his wages, and because RP's own records indicated this, "RP was under a duty to investigate and upon confirmation to cease such illegal, improper and excessive garnishment."[15] Again, Mr. Roush has provided absolutely no authority which would impose upon an employer such a duty. Mr. Roush has not alleged that RP suggested amounts in excess of that which was required by the notices served on RP, or that RP played any role in determining what amount of Mr. Roush's wages would be suggested by the DHS. The undisputed fact remains that RP did no more than take those actions which West Virginia law required. Thus, the Court concludes that in spite of what RP knew or was told by Plaintiff regarding the propriety of the percentage of

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[15]Plaintiff's responsive memorandum, p. 2.

Mr. Roush's wages which were suggested, RP had no duty to conduct its own investigation as. The Enforcement of Family Obligations Act clearly does not contemplate such a responsibility being imposed upon an employer, and the Court is unaware of any other decision which would create such a duty. Thus, the Court concludes that Mr. Roush's complaint, to the extent that it charges RP with suggesting an illegally high amount of Mr. Roush's net weekly income pursuant to W. Va. Code, §48A-5-3(e), fails to state a claim upon which relief can be granted. Accordingly, Count Four of Mr. Roush's complaint is dismissed as to RP.

Based on the foregoing reasons, the Court concludes that Mr. Roush's complaint has failed to state a claim for which relief can be granted against RP. Accordingly, RP's motion to dismiss is granted.

III.

Also pending before the Court is a

motion to dismiss by Mrs Roush pursuant to *Rule* 12(b)(6), Federal Rules of Civil Procedure. Mr. Roush has filed a memorandum of law in opposition, to which Mrs. Roush has replied. Mr. Roush's action against Mrs. Roush is made pursuant to 42 U.S.C. §1983. The civil rights statutes provide causes of action to persons allegedly deprived of federal constitutional rights pursuant to color of state law. Mr. Roush's complaint states that Mrs. Roush, "together with he Department of Human Services and its employee Betty Wickline initiated the wage suggestions complained of herein" Thus, from the complaint, Mr. Roush's involvement in the case was limited to applying for services as an obligee pursuant to W. Va. Code, §48A-1-1. This appears to be the only basis asserted by Mr. Roush in his complaint from which the Court is asked to infer that Mrs. Roush acted under color of state law.

In her motion to dismiss, Mrs. Roush

relies upon Calvert v. Sharp, 748 F.2d 861, 862 (4th Cir. 1984). Calvert held that:

> "A person acts under color of state law only when exercising power possessed by virtue of state law and made possible only because the wrongdoer is clothed in the authority of state law."

Mrs. Roush also relies upon Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987), wherein the Fourth Circuit quoted Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). In Lugar, the United States Supreme Court devised the test for determining when the conduct of an actor is fairly attributable to the state so as to render his/her wrongful conduct the denial of a federal right, actionable under Section 1983.

> "First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible...Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted

> together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state."

Id. at 937.

In Jackson, the Fourth Circuit found that a private bail bondsman who worked with a police officer to gain access to a private individual's home and who jointly harassed and assaulted the individual while in search of a fugitive met the tests articulated in Lugar for when a private citizen can be deemed to be a state actor. The facts set forth in Jackson indicate that in the eyes of the plaintiff homeowner there was no way to distinguish the private bondsman from the police officer. The allegations of joint activity asserted by Mr. Roush in his complaint, however, clearly do not rise to the level of join activity found in Jackson.

In the instant action, Mrs. Roush "concedes for the limited purpose of her motion to dismiss that the first part of the

[Lugar] test is factually alleged in or reasonably inferred from [Mr. Roush's] complaint."[16] Thus, the sole issue for the Court to decide is whether Mrs. Roush, in applying for services as an obligee pursuant to W. Va. Code, §48A-1-1, is a state actor.

Mr. Roush, however, attempts to have this issue evaluated in the context of a prejudgment attachment action. In this vein, Mr. Roush asserts that:

> "The wage withholding action taken against his employer by Defendant Betty Wickline and the Department of Human Services based upon the filing an application of [Mrs. Roush] was a taking without due process as no hearing and Circuit Court order was first obtained and entered as required by state law..."[17]

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[16]Reply of Defendant, Judith Roush, to Plaintiff's memorandum in opposition to Defendant Judith Roush's motion to dismiss, p. 3.

[17]Plaintiff's memorandum in opposition to Defendant Judith Roush's motion to dismiss, p. 5.

Mr. Roush then directs the Court to the second headnote in Lugar, which states as follows:

> "Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a claim under 42 U.S.C. §1983."

Lugar, *supra*, at 484.

Notwithstanding, the Lugar court went on to state:

> "[W]e do not hold today that 'a private party's mere invocation of state legal procedures constitutes joint participation or conspiracy with state officials satisfying the section 1983 requirement of actin under color of law.'"

Id. at 939, n. 21.

The court further ruled that "[t]he holding [above] is limited to the particular context of prejudgment attachment." *Id.* Lugar, therefore, is inapplicable to the case at bar because W. Va. Code, §48A-1-1 is not a prejudgment attachment statute. The Child Advocate Office and the statutes

authorizing the withholding of an obligor's wages do not come into play until after there has been a lawsuit creating the duty to pay child support, and after there has been a divorce decree ordering child support.

Finally, Mr. Roush directs the Court to the decision in White v. White, 731 F.2d 1440 (9th Cir. 1984), which he asserts as "[b]eing almost foursquare with the facts sub judice."[18] In White, the plaintiff sued his former wife along with a state judge who deprived the plaintiff of a portion of his military requirement benefits by enforcing a state divorce judgment finding 80% of his retirement benefits to be community property which judgment was rendered void by a subsequent Supreme Court decision. Mr. Roush, however, neglected to note in his

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[18]Plaintiff's memorandum in opposition to Defendant Judith Roush's motion to dismiss, p. 5.

responsive memorandum that the Ninth Circuit affirmed the district court's dismissal of the plaintiff's Section 1983 action on the ground that the plaintiff failed to state a claim upon which relief can be granted.

The Court, therefore, concludes that the facts as alleged in Mr. Roush's complaint fail to create the inference that Mrs. Roush acted under color of state law or acted such that her conduct can be considered to be joint participation with the state. Accordingly, Mrs. Roush's motion to dismiss is granted.

IV.

As previously stated, *supra*, DHS as well as their paralegal, Wickline, are named as Defendants in this action. Mr. Roush's complaint asserts that the "child advocate office of the Department of Human Services ...act[ed] in concert with its employee and paralegal Betty Wickline [and are] responsible for the illegal and/or

unconstitutional...wage suggestions."[19] Mr. Roush contends that the foregoing represents a violation of his civil rights pursuant to Section 1983. Neither DHS nor Wickline have moved the Court to dismiss the complaint against them. Notwithstanding, the Court, *sua sponte*, chooses to address the issue as to whether Mr. Roush's complaint states a complaint against DHS and Wickline.

In his complaint, Mr. Roush asserts that the actions of DHS and Wickline were illegal because they suggested an "illegally high and usurious amount from Plaintiff's weekly net income" in violation of W. Va. Code, §48a-5-39(f)(3)(A).[20] Section 1983, however, protects individuals from being deprived of their federal constitutional rights. Simply alleging that the state has

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[19]Plaintiff's complaint, p. 3

[20]Plaintiff's complaint, Count Four.

violated a statute does not, in and of itself, suffice to allege a federal constitutional deprivation. Section 1983 was intended to vindicate only federal rights determined under federal substance of law, not claims arising under state law. Weller v. Dept. of Social Services, 901 F.2d 387 (4th Cir. 1990) (violations of state law do not provide basis for due process claim). Accordingly, Count Four of Mr. Roush's complaint is dismissed.

Counts Two and Three, however, further allege that the suggestion of Mr Roush's wages in amounts in excess of the amounts that Mr. Roush was ordered to pay as support constitutes a violation of his federal right to due process. Notwithstanding thee allegations, a Section 1983 action requires the deprivation of a constitutional right by a person acting under color of state law.

In Will v. Michigan Dept. of State Police, 491 U.S. 58, 105 L.Ed.2d 45, 109

S.Ct. 2304 (1989), the Court considered whether the state is a "person" under Section 1983. After thoroughly analyzing the historical background giving rise to Section 1983, the Court concluded that neither the state nor its officials are persons within the meaning of Section 1983. The Court went on to conclude:

> "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants to seek a remedy against a state for alleged deprivations of civil liberties."

491 U.S. at 66. See also Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). In reaching this decision, the Court determined that the scope of Section 1983 is circumscribed by the scope of the Eleventh Amendment immunity which bars such actions unless the state waives its immunity from such suits.

The allegations by Mr. Roush against

Wickline merely allege that she, as an employee of DHS (and thus in her official capacity) initiated the suggestion of his wages.

Accordingly, Mr. Roush's complaint against DHS and Wickline is dismissed.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: April 18, 1991

/s/ Charles H. Haden II,
Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

RODNEY D. ROUSH,

Plaintiff,

vs. CIVIL ACTION NO. 2:90-0912

JUDITH ANNETTE ROUSH, et al,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered this date, the Court hereby ORDERS as follows:

1. That Rhone-Poulenc AG Company's motion to dismiss is granted;

2. That Judith Annette Roush's motion to dismiss is granted;

3. That Plaintiff's complaint against Betty Wickline and the State of West Virginia acting through its Department of Human Services is dismissed; and

4. That this action is dismissed and stricken from the docket of this Court.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: April 18, 1991

/s/ Charles H. Haden II,
Chief Judge

CONSITUTION OF THE UNITED STATES

[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

[AMENDMENT XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

CONSTITUTION OF WEST VIRGINIA

ARTICLE VIII

Circuit Court; Jurisdiction,

Authority and Power

§6. Circuit courts shall have control of all proceedings before magistrate courts by mandamus, prohibition and certiorari.

Circuit courts shall have original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and cots, exceeds one hundred dollars unless such value or amount is increased by the legislature; of all civil cases in equity; of proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari; and of all crimes and misdemeanors. On and after January one, one thousand nine hundred seventy-six, the legislature may provide that all matters of probate, the appointment and qualification of personal representatives, guardians, committees and

curators, and the settlements of their accounts, shall be vested exclusively in circuit courts or their officers, but until such time as the legislature provides otherwise, jurisdiction in such matters shall remain in the county commissions or tribunals existing in lieu thereof or the offices of such county commissions or tribunals.

Circuit courts shall have appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or supersedeas is allowed by law to the judgment or proceedings of any magistrate court, unless suchjurisdiction is conferred by law exclusively upon an intermediate appellate court or the supreme court of appeals.

Circuit courts shall also have such other jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law.

Subject to theapproval of the supreme court of appeals, each circuit court shall have the authority and power to establish local rules to govern the court.

Subject to the supervisory control of the supreme court of appeals, each circuit court shall have generl supervisory control over all magistrate courts in the circuit. Under the direction of the chief justice of the supreme court of appeals, the judge of the circuit court, or the chief judge thereof if there be more than one judge of the circuit court, shall be the administrative head of the circuit court and all magistrate courts in the circuit.

General Provisions Relating to Justices, Judges and Magistrates

§7. All justices, judges and magistrates must be residents of this State and shall be commissioned by the governor. No person may hereafter be elected as a

justice of the supreme court of appeals unless he has been admitted to practice law for at least ten years prior to his election, and no person may hereafter be elected as a judge of a circuit court unless he has been admitted to practice law for at least five yers prior to his election.

Justices, judges and magistrates shall receive the salaries fixed by law, which shall be paid entirely out of the state treasury, and which may be increased but shall not be diminished during their term of office, and they shall receive expenses as provided by law. The salary of a circuit judge shall also not be diminished during his term of office by virtue of the statutory courts of record of limited jurisdiction of his circuit becoming a part of such circuit as provided in sectin five of this artice.

Any justice of the supreme court of appeals and any judge of any circuit court,

including any statutory court of record of limited jurisdiction which becomes a part of a circuit court by virtue of section five of this article, in office on the effective date of this article shall continue in office until his term shall expire, unless sooner removed or retired as authorized in this article: Provided, that as to the term of any judge of a statutory court of record of limited jurisdiction which does not expire on the thirty-first day of December, one thousand nine hundred seventy-six, the following provisions shall govern and control unless any such judges shall be sooner removed or retird as authorized in this article: (1) If the term would otherwise expire before the thirty-first day of December, one thousand nine hundred seventy-six, such term shall continue through and expire on the thirty-first day of December, one thousand nine hundred seventy-six; (2) if the term would otherwise expire on the

first day of January, one thousand nine hundred seventy-seven, such term shall terminate and expire on the thirty-first day of December, one thousand nine hundred seventy-six; and (3) if the term would otherwise expire after the thirty-first day of December, one thousand nine hundred seventy-six, but other than on the first day of January, one thousand nine hundred seventy-seven, such term shall continue through and expire on the thirty-first day of December, one thousand nine hundred eighty-four.

No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; nor shall he become a candidate for any elective public office or nominatino thereto, except a judicial office; and the violation of any of these provisions shall vacate his judicial office. No justice of the supreme court of appeals

or judge of an intermediate appellate court or of a circuit court shall practice the profession of law during the term of his office, but magistrates who are licensed to practice this profession may practice law except to the extent prohibited by the legislature.

If from any cause a vacancy shall occur in the office of a justice of the supreme court of appeals or a judge of a circuit court, the governor shall issue a directive of election to fill such vacancy in the manner prescribed by law for electing a justice or judge of the court in whic the vacancy exists, and the justice or judge shall be elected for the unexpired term; and in the meantime, the governor shall fill such vacancy by appointment until a justice or judge shall be elected and qualified. If the unexpired term be less than two years, or such additional period, not exceeding a total of three years, as may be prescribed

by law, the governor shall fill such vacancy by appointment for the unexpired term.

WEST VIRGINIA CODE

CHAPTER 48A

ENFORCEMENT OF FAMILY OBLIGATIONS

§48A-1-1. Short title.

This chapter shall be known and cited as the "Family Obligations Enforcement Act." (1986, c. 42).

§48A-1-2. Statement of purpose and intent.

It is the purpose of the Legislature in enacting this chapter to improve and facilitate support enforcement efforts in this state, with the primary goal being to establish and enforce reasonable child support orders and thereby improve opportunities for children. It is the intent of the Legislature that to the extent practicable, the laws of this state should encourage and require a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care. (1986, c. 42.)

§48A-2-22. Family law masters fund.

The office and the clerks of the circuit courts shall, on or before the last day of each month, transmit all fees and costs received for the services of the office of the family law master under this chapter to the state treasurer for deposit in the state treasury to the credit of a special revenue fund to be known as the "family law masters fund", which is hereby created. All moneys collected and received under this chapter and paid into the state treasury and credited to the "family law masters fund" shall be used solely for paying the costs associated with the duties imposed upon the family law masters under the provisions of this chapter. Such moneys shall not be treated by the auditor and treasurer as part of the general revenue of the state.

§48A-4-1. Appointment of family law masters; term of office; vacancy; qualifications; removal; compensation and expenses;

location of offices; matters to be heard by master; fees for hearings; notice of master's hearing; content of notice; determination of issues by consent; hearing.

(a) On or before the fifteenth day of September, one thousand nine hundred eighty-six, the governor shall appoint family law masters in such members (sic) and to serve such areas of the state as provided for under the provisions of this article, and such initial appointments of individuals as family law masters shall be for a term ending on the thirtieth day of June, one thousand nine hundred ninety. Thereafter, the length of the term of the office of family law master shall be four years, with terms commencing on the first dy of July, one thousand nine hundred ninety, and on a like date in every fourth year thereafter, and ending on the thirtieth day of June, one thousand nine hundred ninety-four, and on a like date in every fourth year thereafter.

Upon the expiration of his or her term, a family law master may continue to perform the duties of the office until his or her successor is appointed, or for sixty days after the ate of the expiration of the master's term, whichever is earlier. If from any cause a vacancy shall occur in the office of family law master, the governor shall, within thirty days after such vacancy occurs, fill such vacancy by appointment for the unexpired term: Provided, That if the remaining portion of the unexpired term to be filled is less than one year, the governor may, in his discretion, simultaneously appoint an individual to the unexpired term and to the next succeeding full four-year term. An individual may be reappointed to succeeding terms as a family law master to serve in the same or a different region of the state.

(b) No individual may be appointed to serve as a family law master unless he or

she is a member in good standing of the West Virginia State Bar.

(c) Removal of a master during the term for which he or she is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability.

(d) A family law master may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of his or her duties as a judicial officer. Family law masters who do not engage in the practice of criminal law shall be exempted from the appointments in indigent cases which would otherwise be required pursuant to article twenty-one [§29-21-1 et seq.], chapter twenty-nine of this code.

(e) All family law masters, and all necessary clerical and secretarial assistants employed in the offices of family law masters shall be deemed to be officers and

employees in the judicial branch of state government. The director of the child advocate office and the commissioner of the division of human services shall enter into an agreement with the administrative office of the supreme court of appeals whereby the office and the division shall contract to pay the administrative office of the supreme court of appeals for the services of the family law masters required to be furnished under the provisions of this chapter which are not otherwise payable from the family law masters fund created under the provisions of section twenty-two [§48A-2-22], article two of this chapter.

Each county commission of this state shall enter into an agreement with the administrative office of the supreme court of appeals whereby the administrative office of the supreme court of appeals shall contract to pay to the county commission a reasonable amount as rent for premises

furnished by the county commission to the family law master and its staff, which premises shall be adequate for the conduct of the duties required of such master under the provisions of this chapter.

(f) A family law master appointed under the provisions of this article shall receive as full compensation for his or her services an annual salary of thirty-five thousand dollars. The secretary-clerk of the family law master shall receive an annual salary of fifteen thousand dollars and shall be appointed by the family law master and serve at his or her will and pleasure. Disbursement of salaries shall be made by or pursuant to the order of the director of the administrative office of the supreme court of appeals.

(g) Family law masters serving under the provisions of this article shall be allowed their actual and necessary expenses incurred in the performance of their duties.

Such expenses and compensation shall be determined and paid by the director of the administrative office of the supreme court of appeals under such regulations as he or she may prescribe with the approval of the supreme court of appeals.

(h) The offices of the family law masters shall be distributed geographically so as to provide an office of the family law master for each of the following regions:

(1) The counties of Brooke, Hancock and Ohio;

(2) The counties of Marshall, tyler and Wetzel;

(3) The counties of Pleasants, Ritchie, Wirt and Wood;

(4) The counties of Calhoun, Jackson and Roane;

(5) The counties of Mason and Putnam;

(6) The county of Cabell;

(7) The counties of McDowell and Wyoming;

(8) The counties of Logan and Mingo;

(9) The county of Kanawha;

(10) The county of Raleigh;

(11) The counties of Mercer and Summers;

(12) The counties of Fayette and Nicholas;

(13) The counties of Greenbrier, Pocahontas and Monroe;

(14) The counties of Braxton, Clay, Gilmer and Webster;

(15) The counties of Doddridge, Harrison, Lewis and Upshur;

(16) The counties of Marion and Taylor;

(17) The counties of Monongalia and Preston;

(18) The counties of Barbour, Randolph and Tucker;

(19) The counties of Grant, Hampshire, Hardy, Mineral and Pendleton;

(20) The counties of Berkeley, Jefferson and Morgan; and

(21) The counties of Boone, Lincoln and Wayne.

The governor shall appoint two masters to the office of the family law master for the region of Kanawha County. In each of the other regions defined by this subsection, the governor shall appoint one person as family law master form such region. Nothing contained herein shall prohibit the chief justice of the supreme court of appeals from temporarily assigning, from time to time as caseload may dictate, a family law mater from one geographical region to another geographical region.

(i) A circuit court or the chief judge thereof shall refer to the master the following matters for hearing to be conducted pursuant to section two [§48A-4-2] of this article: Provided, That on its own motion or upon motion of a party, the circuit judge may revoke the referral of a particular matter to a master if the master is recused,

if the matter is uncontested, or for other good cause, or if the matter will be more expeditiously and inexpensively heard by the circuit judge without substantially affecting the rights of parties in actions which must be heard by the circuit court:

(1) Actions to obtain orders of support brought under the provisions of section one [§48A-5-1], article five of this chapter;

(2) All actions to establish paternity under the provisions of article six [§48A-6-1 et seq.] of this chapter: Provided, That all actions wherein either or both of the parties have demanded a trial by jury of the law and the facts shall be heard by the circuit court;

(3) All motions for pendente lite relief affecting child custody, visitation, child support or spousal support, wherein either party has requested such referral or the court on its own motion in individual

cases or by general order has referred such motions to the master: Provided, That if the circuit court determines in its discretion, that the pleadings raise substantial issues concerning the identification of separate property or the division of marital property which may have a bearing on an award of support, the court may decline to refer a motion for support pendente lite to the family law master;

(4) All petitions for modification of an order involving child custody, child visitation, chid support or spousal support;

(5) All actions for divorce, annulment or separate maintenance brought pursuant to article two [§48-2-1 et seq.], chapter forty-eight of this code: Provided, That an action for divorce, annulment or separate maintenance which does not involve child custody or child support shall be heard by the circuit judge if, at the time of filing the action, the parties file a written

property settlement agreement which has been signed by both parties;

(6) All actions wherein an obligor is contesting the enforcement of an order of support through the withholding from income of amounts payable as support or is contesting an affidavit of accrued support, filed with a circuit clerk, which seeks to collect arrearages;

(7) All actions commenced under the provisions of article seven [§48A-7-1 et seq.] of this chapter or under the provisions of the revised uniform reciprocal enforcement of support act of any other state; and

(8) Proceedings for the enforcement of support, custody, or visitation orders: Provided, That contempt actions shall be heard by a circuit judge.

(j) The payment of initial fees for a hearing before a master shall be paid before the commencement of the hearing. Any addi-

tional hourly fees beyond the initial fee shall be paid at the conclusion of the hearing, unless a party is excused from payment thereof under the provisions of section one [§59-2-1], article two, chapter fifty-nine of this code. Such initial fees may be paid at any time prior to such hearing, but shall not be required at the time the action is filed,and no advance payment shall be required for additional fees beyond the initial fees required by this section. Any payment of fees for a hearing shall be refunded by the clerk of the circuit court if the master verifies that such hearing was not held, upon the request of the person paying such fees.

(k) Fees for hearings before a master shall be taxed as court costs, which costs may be assessed against either party or apportioned between the parties, in the discretion of the master. The assessment of court costs shall be made at the conclusion

of the hearing and included as findings in each case of a master's recommended order. The fees for hearings before a master shall be as follows:

(1) For an action to establish an order of support, fifty dollars;

(2) For an action to establish paternity, one hundred dollars;

(3) For a motion for pendente lite relief affecting custody, visitation, child support or spousal support, fifty dollars;

(4) For a petition for modification of an order involving child custody, child visitation, child support or spousal support, fifty dollars: Provided, That if the matter is contested, the fee shall be fifty dollars for the first hour or any portion thereof, and thirty dollars per hour for each subsequent hour or any portion thereof;

(5) For an uncontested divorce action, fifty dollars;

(6) For a proceeding for the enforce-

ment of an order, fifty dollars: Provided, That if the matter is contested, the fee shall be fifty dollars for the first hour or any portion thereof, and thirty dollars per hour for each subsequent hour or any portion thereof; and

(7) For a contested divorce action matured for final hearing, fifty dollars for the first hour or any portion thereof, and thirty dollars per hour for each subsequent hour or any portion thereof.

(l) Persons entitled to notice of a master's hearing shall be timely informed of:

(1) The time, place and nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held; and

(3) The matters of fact and law asserted.

(m) The master shall give all inter-

ested parties opportunity for the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment when time, the nature of the proceedings and the public interest permit. To the extent that the parties are unable to settle or compromise a controversy by consent, the master shall provide the parties a hearing and make a recommended order in accordance with the provisions of sections two and four [§§48A-4-2 and 48A-4-4] of this article.

(n) The master who presides at the reception of evidence pursuant to section two of this article shall prepare the default order or make and enter the pendente lite order provided for in section three [§48A-4-3] of this article, as the case may be. Except to the extent required for disposition of ex parte matters as authorized by this chapter, a master may not consult a person or party on a fact in issue, unless on notice and opportunity for

all parties to participate; nor shall the master attempt to supervise or direct an employee or agent engaged in the performance of investigative or prosecuting functions for a prosecuting attorney, the division of human services or any other agency or political subdivision of this state.

§48A-4-2. Hearing procedures.

(a) This section applies, according to the provisions thereof, to hearings required by section one [§48A-4-1] of this article to be conducted in accordance with this section.

(b) A master appointed under the provisions of section one of this article shall preside at the taking of evidence. The functions of the master shall be conducted in an impartial manner. A master may at any time disqualify himself or herself. Upon such disqualification, or upon the filing in good faith of a timely and sufficient affidavit of personal bias or other

disqualification of a master, the circuit court or the chief judge thereof may appoint a temporary master or the circuit court may receive the evidence and determine the matter.

(c) A master presiding at a hearing under the provisions of this chapter may:

(1) Administer oaths and affirmations, compel the attendance of witnesses and the production of documents, examine witnesses and parties, and otherwise take testimony, receive relevant evidence and establish a record;

(2) Rule on motions for discovery and offers of proof;

(3) Take depositions or have depositions taken when the ends of justice may be served;

(4) Regulate the course of the hearing;

(5) Hold pre-trial conferences for the settlement or simplification of issues and

enter time frame orders which shall include, but not be limited to, discovery cutoffs, exchange of witness lists, and agreements on stipulations, contested issues, and hearing scheduled.

(6) Make and enter temporary orders on procedural matters, including, but not limited to, substitution of counsel, amendment of pleadings, requests for hearings and other similar matters;

(7) Accept voluntary acknowledgments of support liability or paternity;

(8) Accept stipulated agreements;

(9) Prepare default orders for entry if the person against whom an action is brought does not respond to notice or process within the time required;

(10) Recommend orders in accordance with the provisions of section four [§48A-4-4] of this article;

(11) Require the issuance of subpoenas and subpoenas duces tecum, issue writs of

attachment, hold hearings in aid of execution and propound interrogatories in aid of execution, and fix bond or other security in connection with an action for enforcement in a child or spousal support matter; and

(12) Take other action authorized by general order of the circuit court or the chief judge thereof consistent with the provisions of this chapter.

(d) Except as otherwise provided by law, a moving party has the burden of proof on a particular question presented. Any oral or documentary evidence may be received, but the master shall exclude irrelevant, immaterial, or unduly repetitious evidence. A party is entitled to present his or her case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In determining claims for money due or the amount of pay-

ments to be made, when a party will not be prejudiced thereby, the master may adopt procedures for the submission of all or part of the evidence in written form.

(e) Hearings before a master shall be recorded electronically. When requested by either of the parties, a master shall provide a duplicate copy of the tape or other electronic recording medium of each hearing held. The party requesting the copy shall pay to the master an amount equal to the actual cost of the tape or other medium or the sum of five dollars, whichever is greater. Unless otherwise ordered by the court, the preparation of a transcript and the payment of the cost thereof shall be the responsibility of the party requesting the transcript.

(f) The recording of the hearing or the transcript of testimony, as the case may be, and the exhibits, together with all papers and requests filed in the proceeding,

constitute the exclusive record for recommending an order in accordance with section four of this article, and on payment of lawfully prescribed costs, shall be made available to the parties. When a master's final recommended order rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§48A-4-3. Default orders; temporary orders.

(a) In any proceeding in which the amount of support is to be established, if the obligor has been served with notice of a hearing before a master and does not enter an appearance, the family law master shall prepare a default order for entry by the circuit judge, which order shall fix support in an amount at least equal to the amount paid as public assistance under section four [§9-3-4], article three, chapter nine of

this code, if the obligee or custodian receives public assistance, or an amount at least equal to the amount that would be paid as public assistance if the obligee or custodian were eligible to receive public assistance, unless the family law master has sufficient information in the record so as to determine the amount to be fixed in accordance with the child support guidelines.

(b) A master who presides at a hearing under the provisions of section two [§48A-4-2] of this article is authorized to make and enter pendente lite support and custody orders which, when entered, shall be enforceable and have the same force and effect under law as pendente lite support orders made and entered by a judge of the circuit court, unless and until such support orders are modified, vacated, or superseded by an order of the circuit court.

(c) All orders prepared by a master

shall provide for automatic withholding from income of the obligor of arrearages in support occur, if no such provision already exists in prior orders or if the existing order as it relates to withholding is not in compliance with applicable law.

§48A-4-4. Recommended orders.

(a) This section applies, according the provisions thereof, when a hearing has been conducted in accordance with section two [§48A-4-2] of this article.

(b) A master who has presided at the hearing pursuant to section two of this article shall recommend an order and findings of fact and conclusions of law to the circuit court within ten days following the close of the evidence. Before the recommended order is made, the master may, in his discretion, require the parties to submit proposed findings and conclusions and the supporting reasons therefor.

(c) The master shall sign and send the

recommended order, any separate document containing the findings of fact and conclusions of law and the notice of recommended order as set forth in section four-a [§48A-4-4a] of this article to the attorney for each party, or if a party is unrepresented, directly to the party, in the same manner as pleadings subsequent to an original complaint are served in accordance with rule five of the rules of civil procedure for trial courts of record. The master shall file the recommended order and the record in the office of the circuit clerk prior to the expiration of the ten-day period during which exceptions can be filed.

(d) A copy of any supporting documents or a summary of supporting documents, prepared or used by the children's advocate or an employee of the child advocate office, and all documents introduced into evidence before the master, shall be made available to the attorney for each party and to each

of the parties before the circuit court takes any action on the recommendation.

(e) All recommended orders of the master shall include the statement of findings of fact and conclusions of law, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and the appropriate sanction, relief, or denial thereof.

§48A-4-5. Orders to be entered by circuit court exclusively.

With the exception of pendente lite support and custody orders entered by a master in accordance with the provisions of section three [§48A-4-3] of this article, and procedural orders entered pursuant to the provisions of section two [§48A-4-2] of this article, an order imposing sanctions or granting or denying relief may not be made and entered except by a circuit court within the jurisdiction of said court and as authorized by law.

§48A-4-6. Circuit court review of master's action or recommended decision.

A person who alleges that he or she will be adversely affected or aggrieved by a recommended order of a master is entitled to review of the proceedings. The recommended order of the master is the subject of review by the circuit court, and a procedural action or ruling not otherwise directly reviewable is subject to review only upon the review of the recommended order by the circuit court.

§48A-4-7. Procedure for review by circuit court.

(a) Within ten days after the master's recommended order, any separate document with findings of fact and conclusions of law and the notice of recommended order is served on the parties as set forth in section four [§48A-4-4] of this article, any party may file exceptions thereto in a petition requesting that the action by the

master be reviewed by the circuit court. Failure to timely file the petition shall constitute a waiver of exceptions, unless the petitioner, prior to the expiration of the ten-day period, moves for and is granted an extension of time from the circuit court. At the time of filing the petition, a copy of the petition for review shall be served on all parties to the proceeding, in the same manner as pleadings subsequent to an original complaint are served under rule five of the rules of civil procedure for trial courts of record.

(b) Not more than ten days after the filing of the petition for review, a responding party wishing to file a cross-petition that would otherwise be untimely may file, with proof of service on all parties, a cross-petition for review. §48A-4-11. Legislative findings and intent.

In enacting the provisions of this article during the second extraordinary

session of the legislature, one thousand nine hundred eighty-six, the Legislature makes its findings of facts and asserts its statements of purposes and intent as follows:

During the regular session of the Legislature, one thousand nine hundred eighty-six, the Legislature enacted Enrolled House Bill 2094, a comprehensive act which dealt with domestic relations law generally and child support and other related issues specifically. In that legislation, the Legislature provided for expedites procedures in actions involving child support and related domestic relations matters.

Since the passage of said Enrolled House Bill 2094, the expedited rocedures (sic) established by the Legislature have been found by the supreme court of appeals to be unconstitutional on the grounds that the legislation attempted to divest the circuit courts of this state of their con-

stitutional jurisdiction for divorce and other domestic matters.

In order to comply with federal law regarding child support enforcement, it is incumbent upon the Legislature to create an expedited process for obtaining and enforcing child support orders. Failure to meet federal standards poses a threat to the state in the form of a loss of public assistance funds and the unavailability of incentive payments based upon support collections.

In West Virginia, as in other states, numerous problems arise out of establishing and enforcing child support orders through the traditional court system. As the volume of support cases ha grown and the use of courts in general to resolve disputes has increased, the result has been lengthy delays in resolving child support cases. In some cases, resolution of the issues is never attempted or resolved. In divorce

cases, the not infrequent use of appointed commissioners, while easing the workload of the circuit court, can result in fees which are not reasonable and payment to a commissioner which is an undue financial burden. Further, jurisdiction and authority over support issues have been divided among the various personnel and officials who prepare and decide chid support matters. There has been a lack of uniformity in the establishment of appropriate support amounts. Use of the traditional court system to determine and enforce child support obligations has exacerbated the adversarial nature of the proceedings, and furthered the division between parents, often diminishing the desire to meet such obligations.

It is the intention of the Legislature, with the passage of this legislation, to reconcile the requirements of federal law, the ruling of the supreme court of appeals as to the constitutional jurisdiction of the

circuit courts, and the needs of this state. The Legislature desires to fully protect the constitutional jurisdiction of the courts while complying with applicable federal law and creating in this state a unified set of family law remedies to eliminate the problems identified herein.

If, in fact, the ruling of the supreme court of appeals as to the jurisdiction of the circuit courts precludes the use of any expedited process, administrative or quasi-judicial, in which the presiding officer is not a judge, then compliance with federal law would be impossible, absent an amendment to the Constitution of the state. Accordingly, the Legislature has adopted the approach embodied in this legislation to avoid that drastic action.

The expedited process set forth herein is modeled upon traditional equity practice in this state which has utilized commissioners in chancery, masters, master's reports

and recommended decisions, authoritative review by the circuit courts and other devices of an equitable nature.

Further, the Legislature anticipates that the procedural rule-making power of the supreme court of appeals provided for in the Judicial Reorganization Amendment of 1974 to the West Virginia Constitution and in section four [§51-1-4], article one, chapter fifty-one of this code may be utilized, so that the portions of this legislation relating to pleading, practice and procedure shall have force and effect only as rules of court and remain in effect unless and until modified, suspended or annulled by rules promulgated by the supreme court of appeals.

§48A-5-3. Withholding from income of amounts payable as support.

(a) The withholding from an obligor's income of amounts payable as spousal or child support shall be enforced by the children's advocate in accordance with the

provisions of this section. Every support order heretofore or hereafter entered by a circuit court or a magistrate of this state and every support order entered by a court of competent jurisdiction of another state shall be considered to provide for an order of income withholding in accordance with the provisions of section fifteen-a or fifteen-b [§48A-2-15a or §48A-2-15b], article two, chapter forty-eight of this code, notwithstanding the fact that such support order does not n fact provide for such an order of withholding.

(b) IN any case in which immediate income withholding is not required, the children's advocate shall cause the mailing of a notice to the obligor pursuant to this section when the support payments required by the order are in arrears in an amount equal to:

(1) One month's support, if the order requires support to be paid in monthly

installments;

(2) Four week's support, if the order requires support to be paid in weekly or biweekly installments; or

(3) Two biweekly installments, if biweekly payments are provided.

(c) If notice required by subsection (b) of this section is appropriate, the children's advocate shall determine the time for a meeting between the obligor and the children's advocate and the time for a hearing before the family law master, and shall then set forth in such notice the times and places at which the meeting and hearing will be held if withholding is contested. The meeting and hearing may be scheduled on the same date, but in no case shall the meeting with the advocate be scheduled less than fifteen days after the date the notice is mailed nor shall the hearing before the master be scheduled more than twenty-one days after the date the notice is mailed.

The children's advocate shall send such notice by first class mail to the delinquent obligor. The notice shall inform the delinquent obligor of the following:

(1) The amount owed;

(2) That it is proposed that there be withholding form the obligor's income of amounts payable as support, and that if withholding is uncontested, or is contested but determined appropriate, the amount withheld will be equal to the amount required under the terms of the current support order, plus amounts for any outstanding arrearages;

(3) The definition of "income" as defined in section three [§48A-1-3], article one of this chapter;

(4) That the withholding will apply to the obligor's present source of income and to any future source of income;

(5) That any action by the obligor to purposefully minimize his or her income will

result in the enforcement of support being based upon potential and not just actual earnings;

(6) That payment of the arrearage after the date of the notice is not a bar to such withholding;

(7) That if the obligor fails to appear at the meeting, withholding will automatically occur as described in the notice;

(8) That a mistake of fact exists only when there is an error in the amount of current or overdue support claimed in the notice, or there is a mistake as to the identity of the obligor;

(9) That matters such as lack of visitation, inappropriateness of the support award, or changed financial circumstances of the obligee or the obligor will not be considered at any hearing held pursuant to the notice, but may be raised by the filing of a separate petition;

(10) That if the obligor contests the withholding, in writing, a meeting with the children's advocate will be held at a time and place set forth in the notice, for the purpose of attempting to settle any issues which are contested, and that a hearing before the family law master cannot be held until after the meeting with the children's advocate occurs;

(11) That if the meeting with the children's advocate fails to resolve the issues being contested, a hearing before the family law master will be held at a time and place set forth in the notice, and that following such hearing, the master will make a recommended order to the circuit court;

(12) That a master's recommended order as to withholding will become effective when it is confirmed and entered by the circuit court, and that if the obligor disagrees with the master's recommended order, he or she will be given the opportunity to make

objections known to the circuit court; and

(13) That if, while the withholding is being contested, it is determined that the obligor is in arrears in an amount equal to or greater than one month's support obligation, but the amount of the arrearage is disputed, then income withholding for the current payment of support will be instituted, and may not be stayed pending a final determination as to the amount of arrearages due.

(d) Withholding should occur when the support order provides for immediate income withholding, or if immediate income withholding is not so provided, and the withholding is contested, then after entry of the master's recommended order by the circuit court. In any case where withholding should occur, the source of income shall proceed to withhold so much of the obligor's income as is necessary to comply with the order authorizing such withholding, up to

the maximum amount permitted under applicable law. Such withholding, unless otherwise terminated under the provisions of this section, shall apply to any subsequent source of income or any subsequent period of time during which income is received by the obligor.

(e) Notwithstanding any other provision of this code to the contrary which provides for a limitation upon the amount which may be withheld from earnings through legal process, the amount of an obligor's aggregate disposable earnings for any given work week which can be withheld as support payments is to be determined in accordance with the provisions of this subsection, as follows:

(1) After ascertaining the status of the payment record of the obligor under the terms of the support order, the payment record shall be examined to determine whether any arrearages are due for amounts which

should have been paid prior to a twelve week period which ends with the workweek for which withholding is sought to be enforced.

(2) If none of the withholding is for amounts which came due prior to such twelve week period, then:

(A) when the obligor is supporting another spouse or dependent child other than the spouse or child for whom the proposed withholding is being sought, the amount withheld may not exceed fifty percent of the obligor's disposable earnings for that week; and

(B) When the obligor is not supporting another spouse or dependent child as described in paragraph (A) of this subdivision, the amount withheld may not exceed sixty percent of the obligor's disposable earnings for that week.

(3) If a part of the withholding is for amounts which came due prior to such twelve week period, then:

(A) Where the obligor is supporting another spouse or dependent child other than the spouse or child for whom the proposed withholding is being sought, the amount withheld may not exceed fifty-five percent of the obligor's disposable earnings for that week; and

(B) Where the obligor is not supporting another spouse or dependent child as described in paragraph (A) of this subdivision, the amount withheld may not exceed sixty-five percent of the obligor's disposable earnings for that week.

(4) In addition to the percentage limitations set forth in subdivisions (2) and (3) of this subsection, it shall be a further limitation that in no case shall the total amounts withheld for current payments plus arrearages exceed the amounts withheld for current payments by an amount greater than ten percent of the obligor's disposable income.

(5) The provisions of this subsection shall apply directly to the withholding of disposable earnings of an obligor regardless of whether the obligor is paid on a weekly, biweekly, monthly or other basis.

(6) If an obligor acts so as to purposefully minimize his or her income and to thereby circumvent the provisions of this section which provide for withholding from income of amounts payable as support, the amount to be withheld as support payments may be based upon the obligor's potential earnings rather than his or her actual earnings, and such obligor may not rely upon the percentage limitations set forth in this subsection which limit the amount to be withheld from disposable earnings.

(f) The source of income of any obligor who is subject to withholding, upon being given notice of withholding, shall withhold from such obligor's income the amount specified by the notice and pay such

amount to the chid advocate office for distribution in accordance with the provisions of section four [§48A-3-4], article three of this chapter. The notice given to the source of income shall contain only such information as may be necessary for the source of income to comply with the withholding order. Such notice to the source of income shall include, at a minimum, the following:

(1) The amount to be withheld from the obligor's income, and a statement that the amount to be withheld for support and other purposes, including the fee specified under subdivision (3) of this subsection, amy not be in excess of the maximum amounts permitted under section 303(b) of the Federal Consumer Credit Protection Act or limitations imposed under the provisions of this code;

(2) That the source of income must send the amount to be withheld from the

obligor's income to the child advocate office within ten days of the date the obligor is paid;

(3) That, in addition to the amount withheld under the provisions of subdivision (1) of this subsection, the source of income may deduct a fee, not to exceed fifty cents, for administrative costs incurred by the source of income, for each withholding;

(4) That withholding is binding on the source of income until further notice by the child advocate office;

(5) That the source of income is subject to a fine for discharging an obligor from employment, refusing to employ or taking disciplinary action against any obligor because of the withholding;

(6) That if the source of income fails to withhold income in accordance with the provisions of the notice, the source of income is liable for the accumulated amount the source of income should have withheld

from the obligor's income.

(7) That the withholding under the provisions of this section shall have priority over any other legal process under the laws of this state against the same income, and shall be effective despite any exemption that might otherwise be applicable to the same income;

(8) that the source of income may combine withheld amounts from obligors' income in a single payment to the child advocate office and separately identify the portion of the single payment which is attributable to each obligor;

(9) That the source of income must implement withholding no later than the first pay period or first date for payment of income that occurs after fourteen days following the date the notice to the source of income was mailed; and

(10) That the source of income must notify the child advocate office promptly

when the obligor terminates his or her employment or otherwise ceases receiving income from the source of income, and must provide the obligor's last known address and the name and address of the obligor's new source of income, if known.

(g) The director shall, by administrative rule, establish procedures for promptly refunding to obligors amounts which have been improperly withheld under the provisions of this section.

(h) A source of income must send the amount to be withheld from the obligor's income to the chid advocate office and must notify the child advocate office of the date of withholding, within ten days of the date the obligor is paid.

(i) In addition to any amounts payable as support withheld from the obligor's income, the source of income may deduct a fee, not to exceed fifty cents, for administrative costs incurred by the source of income,

for each withholding.

(j) Withholding of amounts payable as support under the provision of this section is binding on the source of income until further notice by the child advocate office.

(k) Every source of income who receives a notice of withholding under the provisions of this section shall implement withholding o later than the first pay period or first date for the payment of income which occurs after fourteen days following the date the notice to the source of income was mailed.

(l) A source of income who employs or otherwise pays income to an obligor who is subject to withholding under the provisions of this section must notify the child advocate office promptly when the obligor terminates employment or otherwise ceases receiving income from the source of income, and must provide the office with the obligor's last know address and the name and address

of the obligor's new source of income, if known.

(m) A source of income who has more than a single obligor who is subject to withholding from income under the provisions of this article may combine all withheld amounts into a single payment to the chid advocate office, with the portion thereof which is attributable to each obligor being separately designated.

(n) A source of income is liable to an obligee, including the state of West Virginia or the department of health and human resources where appropriate, for any amount which the source of income fails to withhold from income due an obligor following receipt by such source of income of proper notice under subsection (f) of this section: Provided, That a source of income shall not be required to vary the normal pay and disbursement cycles in order to comply with the provisions of this section.

(o) A source of income who knowingly and wilfully conceals the fact that the source of income is paying income to an obligor, with the intent to avoid withholding from the obligor's income of amounts payable as support, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one hundred dollars.

(p) If the children's advocate makes a written request to a source of income to provide information as to whether the source of income has paid income to a specific obligor, with the preceding sixty-day period, the source of income shall, within fourteen days thereafter, respond to such request, itemizing all such income, if any, paid to the obligor during such sixty-day period. A source of income shall not be liable, civilly or criminally, for providing such information in good faith.

(q) Support collection under the provisions of this section shall have prior-

ity over any other legal process under the laws of this state against the same income, and shall be effective despite any exemption that might otherwise be applicable to the same income.

(r) Any source of income who discharges from employment, refuses to employ, or takes disciplinary action against any obligor subject to income withholding required by this section because of the existence of such withholding and the obligations or additional obligations which it imposes on the source of income, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars.

(s) In any case where immediate income withholding is not required then, at any time following a period of eighteen months during which the obligor has owed no arrearages to the obligee or to the state of West Virginia or any other state, if the

obligee and obligor agree to the termination of withholding and demonstrate to the children's advocate that there is a reliable alternative method by which to make the support payments, they may request the children's advocate to terminate withholding and such withholding from income may cease until such time as further withholding is required by law. The director of the child advocate office shall, by legislative rule, establish state termination standards which will ensure, at a minimum, that withholding will not be terminated where there are indications that it is unlikely that support will continue without such withholding. The mere fact that all arrearages have been paid shall not be a sufficient ground for the termination of withholding.

§1673. Restriction on garnishment.

(a) Maximum allowable garnishment. Except as provided in subsection (b) and in section 305 [15 USCS §1675], the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which is disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [29 USCS §206(a)(1)] in effect at the tie the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set

forth in paragraph (2).

(b) **Exceptions.** (1) The restrictions of subsection (a) do not apply in the case of --

(A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.

(B) any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11 of the United States Code [11 USCS §§1301 et seq.]

(C) any debt due for any State or Federal tax.

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any

person shall not exceed--

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the

twelve-week period which ends with the beginning of such workweek.

(c) **Execution or enforcement of garnishment order or process prohibited.** No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an actin at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RODNEY D. ROUSH,

Plaintiff

vs. CIVIL ACTION NO. 2:90-0912

JUDITH ANNETTE ROUSH, BETTY WICKLINE, The STATE OF WEST VIRGINIA, Acting Through Its DEPARTMENT OF HUMAN SERVICES, And RHONE-POULENC AG COMPANY, A Pennsylvania Corporation,

Defendants

COMPLAINT ALLEGING CIVIL RIGHTS VIOLATIONS, DENIAL OF DUE PROCESS, UNCONSTITUTIONAL STATE STATUTE OR ILLEGAL APPLICATION THEREOF AND OTHER PENDANT JURISDICTION CLAIMS

(JURY DEMANDED)

Plaintiff for his claim for relief states and alleges as follows:

JURISDICTION

1. This action arises principally under the Civil Rights Act, 42 U.S.C.A. §1981, et seq., but especially §1983, and the complaint alleges a violation by defendants

both jointly and severally of plaintiff's rights as granted and afforded by such legislation and by the Federal Constitution. It further alleges the unconstitutionality or unconstitutional and/or illegal application of the West Virginia Enforcement of Family Obligations Act (W. Va. Code §48A-1-1 et seq.) against the plaintiff by the improper suggestion of his wages without first affording Plaintiff due process, but even if due process were afforded, which it was not, by suggesting erroneous and improper amounts from plaintiff's wages which are far in excess of those which are proper nd/or legally permitted under W. Va. Code §48A-1-1 et seq. The complaint then alleges the damages suffered by plaintiff as the result thereof. As a consequence this Court has subject matter jurisdiction over this proceeding as well as pendant jurisdiction over the other claims raised herein.

VENUE

2. Venue is proper in this District pursuant to the provisions of 42 U.S.C.A. §1981 et seq. as all acts of which Plaintiff complains occurred in this District and the Plaintiff and all defendants have t all times relevant hereto resided or maintained places of business within this District.

THE PARTIES

3. Plaintiff Rodney D. Roush, an individual (hereinafter referred to as "Plaintiff"), resides at 24 Lee Drive, St. Albans, West Virginia 25177. Plaintiff is employed as a welder by defendant Rhone-Poulenc AG Company, a Pennsylvania corporation licensed to do business in West Virginia (hereinafter referred to as "Employer"), at its Institute, West Virginia plant or facility. The Employer despite repeated demands to cease has been carrying out or effectuating the illegal and/or unconstitutional and/or excessive suggestion of Plaintiff's wages at the instance of the Department of Human

Services, its employee Betty Wickline and Plaintiff's ex wife Judith Annette Roush. Defendant Judith Annette Roush, the ex wife of plaintiff (hereinafter referred to as "Ex Wife") now, along with Melissa Ann Roush, the daughter of plaintiff and his ex wife, resides at 900 5th Avenue, Apt. 6, St. Albans, West Virginia 25177. The Ex Wife together with the Department of Human Services and its employee Betty Wickline initiated the wage suggestions complained of herein which are being effectuated by the Employer. The State of West Virginia acting through its Child Advocate Office of the Department of Human Services (hereinafter referred to as "DHS") operates a facility at 4190 Washington Street West, Charleston, West Virginia 25313, which serves Kanawha County, and it is this facility acting in concert with its employee and paralegal Betty Wickline which was responsible for the illegal and/or unconstitutional acts (wage

suggestions) hereinafter complained of. Defendant Betty Wickline, a resident of Kanawha County, West Virginia (hereinafter referred to as "Wickline") was at all times relevant to this complaint employed by the DHS at its Charleston facility as a Paralegal, and it was she at the instance of plaintiff's Ex Wife who initiated the illegal and/or unconstitutional wage suggestion procedures against Plaintiff which are complained of herein.

CAUSES OF ACTION

FIRST COUNT

4. In the year 1986 Plaintiff's ex wife initiated a divorce action against plaintiff before the Circuit Court of Kanawha County, West Virginia (Civil Action No. 86-C-2783), acting by and through Kanawha County Family Law Masters Merille Steiger and William Tantlinger, both appointed by the Governor of West Virginia under W. Va. Code §48A-4-1 et seq. It is alleged and submitted that

this Family Law Master system as presently composed and operated is illegal and unconstitutional as it violates the separation of powers provisions and requirements of the Federal and State Constitutions in that the Family Law Masters who are acting in a judicial capacity in divorce matters such as Plaintiff's above described action are at the same time under the control and supervision of the executive branch of the State of West Virginia rather than the Judiciary and are paid directly or indirectly by the DHS of the State, while at the same time it is often the case (as in the case at bar) that the same DHS as pays the Family Law Master is prosecuting claims before the Family Law Master against a spouse such as Plaintiff through its Child Advocate Office.

5. Several days after March 22, 1988 Plaintiff received a written notice form the Child Advocate's Office of the DHS through Betty Wickline its Child Advocate Paralegal

(a true copy of which is attached hereto, incorporated herein and identified as "Plaintiff's Exhibit No. 1") that a suggestion of his wages was being commenced in the amount of $700.00 per month composed of $300 per month in chid support ($150.00 per month per child for the adopted son and the daughter) and $400 per month in alimony. The notice also advised of suggesting an additional Ten Per Cent (10%) of his wages to reduce a $400 arrearage which would all occur unless Plaintiff requested a hearing within 14 days, and if such a hearing was requested Plaintiff was advised it would occur on April 6, 1988 at 9:00 a.m., the day before a hearing was scheduled before Family Law Master Merille Steiger to effectuate such suggestion. Plaintiff did request such hearing as there were factual matters mistaken by DHS/Wickline which they were apparently ignoring which are as follows:

A. On February 11, 1987 Family Law

Master Merille Steiger entered a Recommendation/Order confirming Plaintiff wa in arrears in his alimony obligations as ordered by the Court and/or Family Law Master in the above described divorce proceeding in an amount of $925.00, granted Plaintiff's Ex Wife judgment in that amount and ordered that Plaintiff pay his Ex Wife $100.00 per month in discharge of such arrearage in addition to his regular monthly support obligation of $450.00. This arrearage occurred in the interim between the time Plaintiff was laid off by his previous employer Kaiser Aluminum & Chemical Corporation and the first date he could obtain a hearing upon a motion for a reduction in child support and alimony payments due to such lay off and his significant drop in income to the much lower level of unemployment benefits.

B. At a later February 16, 1988 hearing before Family Law Master William

Tantlinger it was found Plaintiff had paid $45.00 of the arrearage but was still behind in the sum of $880.00. Also at such hearing changes of circumstances were noted as the Ex Wife's son who Plaintiff had adopted had previously left his mother's (the Ex Wife's) custody and returned to live with his putative father in North Carolina. As a consequence Plaintiff's support obligation to his Ex Wife as to such adopted son was reduced by the Family Law Master from $150.00 to $50.00 per month and Plaintiff was ordered to establish a special savings account in the name of such adopted son and deposit therein the monthly sum of $100.00. This the plaintiff did.

C. Plaintiff later appeared at the scheduled April 6, 1988 administrative hearing before DHS/Wickline and explained and objected and he also appeared with his counsel Joseph Zak at the hearing scheduled the next day (April 7, 1988) by DHS/Wickline

to implement the intended wage suggestions before Family Law Master Merille Steiger. The DHS, Wickline and Plaintiff's Ex Wife all failed to appear at this April 7, 1988 hearing and therefore no action was taken by the Family Law Master Merille Steiger on the DHS/Wickline request for wage suggestion and attached hereto, incorporated herein and identified as "Plaintiff's Exhibits Nos. 2 and 3" respectively are true copies of the affidavit of Attorney Joseph Zak attesting to the above representations along with Plaintiff's verification which were attached to motions previously filed in Plaintiff's divorce proceeding on this same issue. Moreover, at the conclusion of such hearing Family Law Master Merille Steiger even telephoned someone at DHS, believed to be their then counsel Anne Charnock, and advised them they could not proceed and suggest plaintiff's wages under such circumstances.

D. Nevertheless, totally ignoring the above described February 18, 1988 Recommendation/Order, the lack of any order authorizing wage suggestion, the telephone admonition of Family Law Master Merille Steiger and repeated demands from Plaintiff and his counsel, DHS/Wickline began suggesting Plaintiff's wages through his Employer based upon the matters set out in their notice (Exhibit No. 1) and not upon the true factual situation. DHS was therefore suggesting $150.00 per month from Plaintiff's wages for his adopted son's support rather than the proper $50.00 per month figure while at the same time Plaintiff was being required to deposit and was depositing $100.00 per month in the special savings account as ordered by the Court as an alternative. As a result over the following eight months Plaintiff's Ex Wife by suggestion of his wages was overpaid child support in an amount of $100.00 per month totalling

$800.00 thus leaving only a possible delinquency or arrearage of $80.00 which was taken out many times over through the suggestion of Plaintiff's wages as herein described. Moreover, even after Plaintiff's adopted son reached eighteen years of age DHS/Wickline still continued to suggest Plaintiff's wages for his support until eventually they responded to Plaintiff's repeated written demands and reduced the suggestion by $150.00 per month to a total of $550.00 per month plus ten per cent toward a nonexisting arrearage they still continued to suggest.

E. Regarding Plaintiff's duty of support to his daughter Melissa Ann Roush in the ordered amount of $150.00 per month, Melissa Ann Roush moved from her mother's custody in August of 1988 and thereafter resided with her father, the Plaintiff, until April 11, 1989 when she was taken from plaintiff's home by his Ex Wife. Plaintiff

was therefore entitled to a credit against his duty of support of $150.00 per month for eight months totalling $1,200.00. This credit to which Plaintiff was entitled wa later recognized at hearings before Family Law Master William Tantlinger and Kanawha Circuit Judge John Hey, and in fact Michelle Grinberg, the Ex Wife's legal counsel, even stipulated that as of a hearing on July 27, 1989 before Judge Hey Plaintiff had overpaid his Ex Wife as of that date the sum of $121.25. Nevertheless, during the time his daughter resided with him the suggestion against Plaintiff's wages for his daughter's support continued.

F. As a consequence of all of the above Plaintiff moved the Circuit Court at the July 27, 1989 hearing to terminate further suggestion upon his wages which was granted (See true copy of order of that hearing entered August 23, 1989 which is attached hereto, incorporated herein and

identified as "Plaintiff's Exhibit No. 4". Also see September 7, 1989 letter from DHS counsel Anne Charnock and August 29 and August 31, 1989 DHS Notices to Plaintiff's Employer to resume suggesting Plaintiff's wages in October of 1989 and then to cease suggesting Plaintiff's wages pursuant to the August 28, 1989 Court Order.

G. Shortly after the August 23, 1989 Court Order as the result of the July 27, 1989 hearing was entered Plaintiff's Ex Wife filed a petition seeking a writ of prohibition from the West Virginia Supreme Court of Appeals attempting to block certain portions of such order and a later order which effected a change of custody of the daughter due to the Ex Wife's failure to comply with the previous Order, and stopped the wage suggestions upon Plaintiff through his Employer. The later Order also recognized the fact Plaintiff had overpaid and was entitled to a credit against same as of that

time, not to mention the fact that no previous order permitting such suggestion had ever been approved by the Court or the Family Law Master.

SECOND COUNT

6. Plaintiff realleges and repleads the allegations contained in the First Count above and in addition thereto alleges the following additional matters.

7. Defendants' conduct as aforesaid in both jointly and severally suggesting and continuing to suggest Plaintiff's income without right or authority to do so in constitutional and statutory disregard and contravention of the Courts, of the laws of this state and of plaintiff's constitutional and statutory rights to hearing and due process thereunder while supposedly acting at all times under color of state law (W. Va. Code 48A-5-1 et seq.) is a violation of plaintiff's civil rights as afforded by the Civil Rights Act (42 U.S.C.S. §1981 et seq), and plaintiff is

therefore entitled to damages for such violations both jointly and severally against the defendants.

THIRD COUNT

8. Plaintiff realleges and repleads the allegations of the First and Second Count above and in addition thereto alleges the following additional matters.

9. Defendants in continuing their illegal and improper suggestion of Plaintiff's wages rely at least partially upon W. Va. Code §48A-5-3(r) which essentially states that the mere fact a party owes no arrearage is not grounds to discontinue suggesting his or her wages.

10. W. Va. Code §48A-5-1 et seq., and especially section 1(r) is therefore unconstitutional as it can act to take a person's property for a nonexistent debt or obligation and it can do so without even affording such person basic due process and protection under the law.

FOURTH COUNT

12. Plaintiff realleges and repleads the allegations set out in the First, Second and Third Counts above and in addition thereto alleges the following additional matters.

13. Attached hereto, incorporated herein and identified as "Plaintiff's Exhibit No. 5" is a Written Summary of the monies which have in the past been suggested from Plaintiff's wages by his Employer and by the other defendants acting ostensibly under color of the West Virginia Family Support Act and the suggestion procedures afforded thereby which are identified and described above. The Court will note that in some weeks as much as 78 Per Cent (78%) of Plaintiff's net weekly income are being suggested and taken from Plaintiff's net weekly wages although W. Va. Code §48A-5-39(f)(3)(A) as amended expressly provides that such suggestion as to a person supporting a spouse or dependent child other than

those for which withholding is sought (such as Plaintiff who has since remarried) "... may not exceed fifty-five percent of the obligor's disposable earnings for that week;"

13. Plaintiff's employer, therefore, in addition to acting in concert with the other defendants by illegally and/or unconstitutionally suggesting Plaintiff's wages, is also suggesting an illegally high and usurious amount from Plaintiff's weekly net income on a continuing and flagrant basis even if such suggestion was valid and proper which it is not. This improperly high suggestion continues even now unabated despite repeated complaints, demands and requests by Plaintiff and his counsel to the defendants to cease and desist therefrom. Plaintiff is therefore entitled to damages against his Employer as well as the other defendants for its illegal and/or unconstitutional acts and/or complicity as afore-

said.

FIFTH COUNT

15. Plaintiff realleges and repleads the allegations set out in the First, Second, Third and Fourth Counts above and in addition thereto alleges the following additional matters.

16. Despite the fact the ex-wife's living arrangements have changed since the Court ordered alimony and child support rulings described above were entered (the ex-wife and her daughter moved in to her boyfriend's home and lived there for almost two years) and despite the fact W. Va. Code §78-16-1 et seq. requires that a cohabitator's income (such as that of the ex-wife's boyfriend, Robert Cain) be taken into consideration under child support and alimony guidelines, the ex-wife has not advised the DHS or the Court of same and she continues to demand and receive the same amounts from plaintiff through suggestion of his wages as were

ordered before her coverture and cohabitation with Robert Cain. This conduct upon her part is a fraud both against the DHS and the Courts of the State and against the plaintiff.

17. Plaintiff is therefore entitled to judgment for fraud against his ex-wife and for damages by reason of the ex-wife's conduct as aforesaid.

DAMAGES

18. All of the above acts on the part of the defendants have caused and continue to cause Plaintiff and his family unnecessary and extreme personal emotional and economic hardships by taking significant amounts, and in some weeks almost all of his net income. These hardships have damaged plaintiff's physical and mental health and well being, have caused Plaintiff and his family to endure on occasions deprivation of food and adequate shelter and have significantly damaged and impinged upon the quality of

life to which Plaintiff and his family are entitled while at the same time most of such monies were being seized from his weekly income Plaintiff did not even owe any child support or alimony as it was stipulated at such times he had in fact overpaid such support and was entitled to credits against his Ex Wife who, nevertheless, continued to demand and require the suggestion of plaintiff's wages.

WHEREFORE, Plaintiff demands judgment against defendants both jointly and severally of compensatory damages of Five Million Dollars ($5,000,000.00) and punitive or exemplary damages of Five Million Dollars ($5,000,000.00) plus attorney fees and the expenses required in the prosecution and maintenance of this action. Plaintiff also requests such further relief as the Court might deem meet and proper in the premises under the given circumstances.

RODNEY D. ROUSH
By Counsel

/s/ Larry L. Skeen
Larry L. Skeen, #3437
Attorney for Plaintiff
216 W. Main Street
P. O. Box 66
Ripley, West Virginia 25271-0066
(304) 372-3061

CAO Case No. _____

OFFICE OF THE KANAWHA COUNTY CHILD ADVOCATE

Judith A. Roush
Plaintiff

Circuit Court of Kanawha County, West Virginia

v.

Civil Action Number:
86-C-2783

Rodney D. Roush
Defendant

NOTICE TO OBLIGOR Rodney A. Roush
122 Virginia Ave
St Albans WV 25177

PURSUANT TO WEST VIRGINIA CODE §48A-5-3, YOU ARE HEREBY NOTIFIED THAT:

1. You are under a Kanawha County Circuit Court order to pay $700.00 per month for child/spouse support.

   $300.00 $400.00

2. Information available to the Child Advocate Office indicates that you are behind in your payment of spousal support by an amount equal to thirty days of support.

3. It is proposed to withhold from your income the court ordered amount of

"Plaintiff's Exhibit No. 1"

$700.00 per month for current support.

4. It is further proposed to withhold form your income, in addition, ten percent (10%) of your disposable income per month to reduce your arrearage of $400.00 accumulated from 1 February 1988, until 22 March, 1988, until paid in full.

5. This withholding applies to your present source of income and any future source of income within the State of West Virginia.

6. PAYMENT OF YOUR ARREARAGE AFTER THE DATE OF THIS NOTICE WILL NOT PREVENT THIS WITHHOLDING.

7. You may contest this proposed withholding only for a mistake of fact. A mistake of fact is:

   a. A mistake in the amount of the support order;

   b. A mistake in the amount of the arrearage;

c. Your are not subject to this order; or

d. The proposed withholding exceeds the amounts permitted under federal or state law.

8. You may contest the proposed withholding at a meeting with the Child Advocate Office if you inform this Child Advocate Office IN WRITING within fourteen (14) days of the ate of this notice of the basis for your contest.

9. The Child Advocate Office has scheduled a meeting with you AT THIS OFFICE on 6 April, 1988 at 9:00 AM to settle any mistakes of fact you have raised IN WRITING to this Child Advocate Office.

10. IF YOU DO NOT RESPOND TO THIS NOTICE IN WRITING OR DO NOT APPEAR AT THE CHILD ADVOCATE OFFICE MEETING AFTER RESPONDING TO THIS NOTICE IN WRITING, INCOME WITHHOLDING WILL PROCEED AUTO-

MATICALLY BY NOTIFICATION FROM THE CHILD ADVOCATE OFFICE TO YOUR SOURCE OF INCOME TO MAKE THE WITHHOLDING.

11. If the meeting with the Child Advocate Office fails to resolve the contested mistakes of fact, a hearing on the proposed withholding will be held before the Kanawha County Family Law Master, 409 Virginia St., E, Chas, WV 25301 (old Courthouse) on 7 April, 1988, at 9:00 AM.

THE HEARING BEFORE THE FAMILY LAW MASTER WILL NOT BE HELD UNLESS YOU CONTEST THE WITHHOLDING IN WRITING (PARAGRAPHS 7 AND 8) AND ATTEND THE MEETING AT THE CHILD ADVOCATE OFFICE (PARAGRAPH 9). YOU MUST FOLLOW PARAGRAPHS 7, 8, and 9 IN ORDER TO HAVE THE HEARING BEFORE THE FAMILY LAW MASTER. IF YOU DO NOT COMPLY WITH PARAGRAPHS 7, 8 and 9 OF THIS NOTICE, INCOME WITHHOLDING WILL PROCEED AUTO-

MATICALLY BY NOTIFICATION FROM THE CHILD OFFICE TO YOUR SOURCE OF INCOME WITHOUT A HEARING BEFORE THE FAMILY LAW MASTER. If your contest proceeds to a hearing before the Family Law Master, the Family Law Master shall make a recommended decision to the Circuit Court which will become effective when it is confirmed and ordered by the Circuit Court. If you disagree with the recommended decision of the Family Law Master, you can petition the Circuit Court for review of the recommended decision.

12. If you agree to this proposed withholding, you should notify the Child Advocate Office in writing within fourteen (14) days of the date of this notice to cancel the meeting with the Child Advocate Office and the hearing before the Family Law Master.

13. Visitation, custody, inappropriateness

of the support order, changed financial circumstances of you or your former spouse, or other issues will not be considered at the meeting with the Child Advocate Office or the hearing before the Family Law Master. These issues must be addressed in a separate proceeding.

14. Any action by you purposefully to minimize your income will result in the enforcement of support being based upon potential and not just actual earnings.

This notice is sent this 22nd day of March, 1988, by United States Postal Service first mail to 122 Virginia Ave, St Albans, WV 25177.

22 Mar 88
Date

/s/ Betty Wickline
Child Advocate Paralegal

CHILD ADVOCATE OFFICE
4190 Washington St, W
Charleston, WV 25313
Telephone: (304) 348-4098
ext 1268

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JUDITH ANNETTE ROUSH,

Plaintiff,

v. CIVIL ACTION NO. 86-C-2783

RODNEY DELL ROUSH,

Defendant.

AFFIDAVIT

Comes now your affiant, R. Joseph Zak, and, being duly sworn, deposes and says as follows:

1. That he is an attorney licensed to practice law in Kanawha County, West Virginia.

2. That during the month of April, 1988, and prior thereto, he had represented the defendant, Rodney Dell Roush, in his divorce action pending before the Circuit Court of Kanawha County, West Virginia.

3. That he recalls appearing at a scheduled hearing before Family Law Master,

Merille Steager, at which the Department of Human Services failed to appear by the Child Advocate or any other person to his knowledge.

4. That he recalls the Family Law Master having a conversation with someone at the office of the Department of Human Services; however, he does not recall the exact nature of the conversation other than to generally state that it dealt with a mistake regarding the calculation of arrearages in his case.

And further this affiant saith not.

/s/ R. Joseph Zak

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

R. Joseph Zak, the affiant named in the hereto annexed Affidavit, being by me first duly sworn according to law, upon his oath, says that the facts and allegations contained therein are true, except insofar as

they are therein stated to be upon information and belief, and that insofar as they are therein stated to be upon information and belief, he believes them to be true.

/s/ R. Joseph Zak

Taken, subscribed and sworn to before me this 8th day of May, 1990.

My commission expires November 13, 1995.

/s/ Thelma L. Anania
Notary Public

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

RODNEY DELL ROUSH, defendant-movant named in the preceding pleading, after first being duly sworn, upon his oath, deposes and says that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

/s/ Rodney Dell Roush

Taken, subscribed and sworn to before me this 9th day of May, 1990.

My commission expires March 31, 1999.

/s/ Pamela D. Snodgrass
Notary Public

"Plaintiff's Exhibit No. 3"

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JUDITH ANNETTE ROUSH,

Plaintiff

vs. CIVIL ACTION NO. 86-C-2783

RODNEY DELL ROUSH,

Defendant

ORDER

On this 27th day of July, 1989 came the parties in person and by counsel for hearing upon the objections and exceptions filed by each of the parties to the Family Law Master's recommendations filed April 25, 1989 as the result of a hearing held on January 17, 1989.

After hearing the arguments and representations of counsel as to the circumstances of the parties and the subsequent changes in the factual situation and the subsequent emergency hearing since the January 17, 1989 hearing, the Court accord-

ingly Finds, Orders, Adjudges and Decrees as follows:

1. Melissa Ann Roush, the 13 year old daughter of the parties, has been residing with her mother the plaintiff since shortly before the emergency hearing held by Family Law Master Tantlinger on April 25, 1989. The plaintiff and her daughter are currently living in a home with a man to whom plaintiff is not married, and the Court will not permit such child to remain in her mother's custody nor condone such circumstances. The Court therefore grants plaintiff thirty days from the date of this hearing in which either to marry such man or to move out and establish separate living arrangements for her and her daughter. If neither alternative condition is met within such thirty day period the Court grants custody of Melissa Ann Roush to her father the defendant but subject o reasonable visitation rights in the mother to be established by counsel for

the parties or by guidelines adopted by the Court. If plaintiff meets either of such alternative conditions within such thirty day period then her continuing custody of her daughter is confirmed but subject to the same reasonable visitation rights in the defendant father a are established by agreed order of counsel for the parties or by guidelines adopted by this Court.

2. The Court further finds that by reason of plaintiff's conduct as aforesaid the defendant is not responsible for alimony or child supports to the plaintiff for the period from the 27th day of July, 1989 to the 27th day of August, 1989, and as to defendant's future duty for child support and alimony payments thereafter, the Court remands this case to the Family Law Master with instructions to renew defendant's obligation for child support for Melissa Ann Roush should her mother meet either of the above alternative conditions but to termi-

nate it should she not and the defendant is thus awarded her custody. As to defendant's objection and exception regarding the Law Master's recommendation that he is not at this time entitled to a termination of alimony, for a reduction in alimony or for changing such alimony into rehabilitative alimony with a definite termination date therefor, in view of plaintiff's conduct the defendant's exception is well taken and the Court therefore sets aside Family Law Master's recommendation and remands the matter back to the Family Law Master with instructions that he hear further evidence on such issues and thereafter recommend any such matters as the evidence recommends.

3. As to the suggestion presently outstanding against defendant's wages counsel agree that defendant has previously paid all such arrearages and is now in fact owed a credit thereon which, according to the Department of Human Services, amounts to

$121.15. The Court therefore orders that such suggestion be dismissed and discharged and a copy of this order is to be delivered to the West Virginia Department of Human Services as evidence of the Court's ruling in this regard.

4. It further appearing to the Court that the parties' daughter should have psychological evaluation, the Court ORDERS that defendant, at his expense, make arrangements for such psychological counselling for their daughter and that the parties cooperate with the psychologist employed, and that the psychologist thereafter prepare and file with the Family Law Master a written report setting out his findings.

5. Except as modified herein the previous orders of this Court shall remain in full force and effect.

All of which is, accordingly, ORDERED as of the date first above written.

And to all rulings of the Court, plain-

tiff objects and excepts.

ENTER:

/s/ John Hey, Judge

Approved for Entry:

/s/ Michele Grinberg

Attorney for Plaintiff

/s/ Larry L. Skeen - Approved except as to date filled in by opposing counsel

Attorney for Defendant

RODNEY ROUSH

Information from Check Stubs

Pay Period Ending	Gross Wages	Net Wages	Garnish-ment	% of Garnishment
5/21/88	574.80	94.29	271.82	74%
5/28/88	574.80	89.96	271.82	75%
6/4/88	574.80	115.51	271.82	70%
6/11/88	574.80	115.51	271.82	70%
6/18/88	574.80	115.51	271.82	70%
7/2/88	574.80	89.96	271.82	75%
7/9/88	574.80	115.51	271.82	70%
7/16/88	574.80	181.92	205.41	53%
7/30/88	574.80	89.96	271.82	75%
8/6/88	574.80	115.51	271.82	70%
8/13/88	574.80	181.92	205.41	53%
8/27/88	574.80	78.06	283.72	78%
9/3/88	574.80	93.53	283.72	75%
9/10/88	574.80	181.92	205.41	53%
10/1/88	574.80	89.96	271.82	75%
10/8/88	574.80	115.51	271.82	70%
10/15/88	579.11	160.81	209.08	56%
10/29/88	574.80	83.85	257.93	75%
11/5/88	574.80	109.40	257.93	70%
11/12/88	574.80	161.92	205.41	56%
11/26/88	574.80	83.85	257.93	75%
12/3/88	574.80	109.40	257.93	70%
12/10/88	527.38	136.66	202.62	59%
12/31/88	574.80	82.93	258.76	75%
1/7/89	574.80	109.73	258.76	70%
1/28/89	546.06	76.97	247.77	76%
2/4/89	574.80	109.73	258.76	70%
2/11/89	560.43	146.82	213.06	59%
3/4/89	574.80	109.59	258.76	70%
3/11/89	574.80	131.49	236.86	64%
4/1/89	574.80	104.69	236.86	69%
4/8/89	574.80	132.18	237.89	64%
4/29/89	560.60	119.33	214.69	64%
5/6/89	660.85	173.05	247.06	58%

"Plaintiff's Exhibit No. 5"

5/27/89	614.80	133.63	232.44	63%
6/3/89	614.80	160.43	232.44	59%
7/8/89	614.80	158.04	234.55	59%
7/15/89	614.80	158.04	234.55	59%
7/29/89	553.32	114.90	214.53	65%
8/5/89	614.80	158.04	234.55	59%
10/28/89	614.80	91.09	274.70	75%
11/4/89	614.80	117.29	275.30	70%
12/2/89	614.80	91.09	274.70	75%
12/9/89	614.80	117.29	275.30	70%
12/30/89	614.80	112.54	251.46	69%
1/6/90	614.80	142.65	250.95	64%
1/27/90	614.80	111.96	252.04	69%
2/3/90	614.80	141.56	252.04	64%
2/24/90	614.80	131.02	232.98	64%
3/3/90	614.80	160.62	232.98	59%
3/31/90	614.80	131.94	232.98	64%
4/7/90	607.12	159.50	230.49	59%
4/28/90	634.80	136.74	239.98	64%
5/5/90	634.80	166.34	239.98	59%
6/2/90	634.80	117.10	259.62	69%
6/9/90	634.80	146.70	259.62	64%
6/30/90	634.80	-0- + 176.73	259.62	59%
7/7/90	606.23	-0- + 169.90	249.59	61%
7/28/90	444.36	71.18	192.54	73%
8/4/90	634.80	146.42	259.62	64%
9/1/90	634.80	92.83	283.61	75%
9/8/90	634.80	122.66	283.38	70%

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RODNEY D. ROUSH,

Plaintiff,

vs. CIVIL ACTION NO. 2:90-0912

JUDITH ANNETTE ROUSH, BETTY WICKLINE, The STATE OF WEST VIRGINIA, Acting Through Its DEPARTMENT OF HUMAN SERVICES, and RHONE-POULENC AG COMPANY, a Pennsylvania corporation,

Defendants

The deposition of BETTY JO WICKLINE was taken under the Federal Rules of Civil Procedure in the above-entitled action, on the 29th day of March, 1991, at 1:00 p.m., in the law offices of Steptoe & Johnson, 715 Charleston National Plaza, Charleston, Kanawha County, West Virginia, before Margaret E. Billanti, Court Reporter and Notary Public in and for the State of West Virginia, pursuant to notice and agreement.

MARGARET E. BILLANTI
COURT REPORTER
103 SUMMIT PARK
ELKVIEW, WEST VIRGINIA 25071
304-965-7444

Q Are you telling me that you are the one who decides whether or not there is a mistake of fact and not the Family Law Master?

A No, I didn't say that.

Q I just wanted --

A I told him that I explained -- I went over the form where it states on the form about the mistake of fact and what a mistake of fact is, what you can use for a mistake of fact, and that I would -- and as far as that from and the mistake of fact that said on there, we didn't have a mistake of fact. Okay.

But that whatever he wanted, I was to go back and explain it to the Advocate, which I did, and she makes the decision or he, whoever. The Advocate makes the decision whether it's going to go before the Family Law Master.

Q They can decide whether or not you

get a hearing and not the -- I still don't understand. Let me try to rephrase the question. You mean the Family Law Master has the right to decide whether or not the hearing that

you're notified is going to take place, actually takes place?

MR. FIFE: I think you misstated.

MS. GRINBERG: I object to the form of the question.

MR. FIFE: As the full question again, I'm sorry.

BY MR. SKEEN:

Q You talked with Anne Charnock, I take it then, after you had the meeting with Rodney Roush that day?

A Yes.

Q As a result of that, what was decided about the hearing the following day? What, if anything, was decided?

A Well, I told Anne Charnock that he wanted to take it before the Family Law Master and she said, "Was there a mistake of fact," and I went over the case.

She said, "There's no mistake of fact and there won't be a Family Law Master here, because there's no mistake of fact, and there's no other court order signed by

a judge."

Q As a result of that, did you or did Anne Charnock, to your knowledge, notify Rodney Roush or the Family Law Master before whom the matter was scheduled to advise them that you were not going to be appearing at a hearing and that there wasn't going to be a hearing?

A I called his home to inform him that there would not be -- that I had talked to the attorney and there would not be a Law Master hearing.

I also called Judith to tell her that, because if there is a Family Law Master hearing, she is required to be there. So I had to call both of them, which I did.

Q You talked to Rodney?

A I called his home --

Q Who did you talk to?

A -- to tell him. As far as I can remember, I talked to him.

Q You told him that there wasn't going to be a hearing the next day?

A I told him when he left the office that I would talk to her, he could go on home, I would talk to the Attorney and let him know what she decided. So we'd know whether to go or whether not to go. I couldn't tell him, I don't make that decision. I don't go to the Family Law Master hearings.

Q Besides these telephone calls you

say you made, there was nothing -- did anybody contact the Family Law Master, do you recall?

A Okay. Anne Charnock is the one that goes to those Family Law Master hearings. She is the one that told me to send the LD-3, which was the Wage Withholding Notice to the employer, then, before I even called him. Okay. "There is no mistake of fact, there will not be a Family Law Master hearing, send the Wage Withholding Notice."

Q That was told to you later, the same afternoon or the same day, right after you met with Rodney?

A Well, I walked out of the room with him, walked back into my office and talked to her, and that's what I was told.

Q The wage withholding was then sent out by your Department under the direction of Anne Charnock the day before the hearing

that was scheduled before the Law Master?

A It was sent the day he came in to see me.

Q The hearing that was scheduled before the Law Master was the next day, right?

A Well, I wasn't sure when. It could have been the next day or it could have been two or three days after that. I'm not sure exactly what day it was scheduled.

Q But it was on the notice that you had there in your file?

A Yes, it's on the notice, but it's not up here (indicating).

Q I guess then the bottom line is, that nobody showed up the next day before the Human Services at this --

A I didn't --

Q -- before the Family Law Master; is that right?

MR. FIFE: I'll object to that. I don't think she has that within her

knowledge. She said she

AP Number 98537

CAO Case No. 090005244

OFFICE OF THE KANAWHA COUNTY CHILD ADVOCATE

Judith A. Roush Circuit Court of Kanawha

Plaintiff County, West Virginia

v. Civil Action Number: 86C2783

Rodney D. Roush

Defendant

NOTICE TO EMPLOYER/SOURCE OF INCOME

TO MODIFY WITHHOLDING

Pursuant to West Virginia Code §48A-5-3, you are hereby notified to modify the income withholding for Rodney Roush, Social Security Number 236-84-4842, Date of Birth _____, as follows:

1. The current support withholding from $126.92 per week to $92.31 per week, because Mr. Roush is no longer obligated to pay child support. Mr. Roush is to continue paying alimony.

X 2. The arrearage amount from $-0- to $-0-, because _____.

This modification is effective upon receipt.

Your obligations under the original notice of withholding remain in effect.

A copy of the foregoing was sent by United States Postal Service ____ mail on the ___ day of _____, 19___, to the following:

Employer/Source of Income: Rhone Poulenc
POB 283
Charleston WV 25330
Attn: Betty Watson
Benefit Plans Office

Obligor: Rodney D. Roush
POB 236
St. Albans WV 25177

Counsel: Larry Skeen, Esq.
POB 66
Ripley WV 25271-0066

Kanawha County Circuit Clerk
G. P. Schrader
Child Advocate Paralegal

CHILD ADVOCATE OFFICE

4190 Washington St W

Charleston, WV 25313

Telephone: (304) 348-4098

ext 1271

No. 91-1512 (3)

Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1991

RODNEY D. ROUSH,
Petitioner,

v.

JUDITH ANNETTE ROUSH, BETTY WICKLINE, THE STATE OF WEST VIRGINIA Acting Through Its DEPARTMENT OF HUMAN SERVICES, and RHONE-POULENC AG COMPANY, a Pennsylvania corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Michael B. Victorson
Christopher B. Power
ROBINSON & McELWEE
Post Office Box 1791
Charleston, WV 25326
(304) 344-5800

Counsel for Respondent - Rhone-Poulenc Ag Company

Michele Grinberg
FLAHERTY, SENSABAUGH & BONASSO
Post Office Box 3843
Charleston, WV 25338
(304) 345-0200

Counsel for Respondent - Judith Roush

Steven P. McGowan
W. Randolph Fife
Andrew L. Paternostro
STEPTOE & JOHNSON
Post Office Box 1588
Charleston, WV 25326
(304) 353-8000

Counsel for Respondents - Betty Wickline and State of West Virginia, Acting Through Department of Human Services

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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II. SUMMARY OF ARGUMENT 10

III. ARGUMENT 11

A. THE WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES AND BETTY WICKLINE, IN HER OFFICIAL CAPACITY AS AN EMPLOYEE OF THE DEPARTMENT, ARE NOT PERSONS WITHIN THE MEANING OF 42 U.S.C. § 1983 AND, THUS, WERE PROPERLY DISMISSED FROM THIS ACTION. 11

B. W. VA. CODE § 48(A)-5-3 (1986) PROVIDES AN OBLIGOR WITH NOTICE THAT HIS WAGES ARE TO BE WITHHELD, THAT HE IS PERMITTED TO CONTEST THE WITHHOLDING AND THAT STATE AND FEDERAL EXEMPTIONS EXIST. THE STATUTE IS THEREFORE CONSTITUTIONAL. 13

C. JUDITH ROUSH IS NOT A STATE ACTOR. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF HER FROM THE LAWSUIT. 32

D. UNDER APPLICABLE STATE LAW RP WAS REQUIRED TO HONOR THE ORDERS DIRECTING THAT MR. ROUSH'S WAGES BE WITHHELD AND WOULD HAVE BEEN LIABLE FOR ANY AMOUNTS NOT WITHHELD. THE DISTRICT COURT PROPERLY RULED THAT MR. ROUSH FAILED TO STATE A CLAIM AGAINST HIS EMPLOYER UPON WHICH RELIEF COULD BE GRANTED AND THE COURT OF APPEALS CORRECTLY AFFIRMED THAT DISMISSAL. 49

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I. STATEMENT OF THE CASE

Petitioner, Rodney D. Roush, (hereinafter the "plaintiff") has filed a Petition for Writ of Certiorari (Petition) to review the Fourth Circuit's affirmance of the District Court's dismissal of the plaintiff's complaint. The dismissal was granted based on timely filed Motions to Dismiss. A 12(b)(6), Fed. R. Civ. Proc., Motion to Dismiss is based on the pleadings only. Nevertheless, the plaintiff in his Appellant's Brief to the United States Court of Appeals for the Fourth Circuit and in his Petition to this Honorable Court at pages 4 - 21 includes a number of alleged facts which are not before this Court and were not before the Fourth Circuit below. In its opinion affirming the decision of the Honorable

Charles H. Haden, II, the Fourth Circuit did not consider the miscellaneous alleged facts and inferences raised by the plaintiff, but rather affirmed the dismissal of the complaint based on the complaint itself. Nevertheless, as Rule 15 of the Revised Rules of the Supreme Court of the United States requires, some of the alleged facts objected to by the respondents[1] will be noted below before proceeding to argument on the merits. In addition, as set forth below, Mrs. Roush does not find the dismissal of herself from the lawsuit to be fairly included in any of the questions set forth in the Petition

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[1] The respondents in this case are Judith Roush (hereinafter "Mrs. Roush"); The West Virginia Department of Human Services (hereinafter "DHS"); Betty Wickline, in her official capacity as an employee of the DHS (hereinafter "Wickline"); and Rhone-Poulenc AG Company (hereinafter "RP").

as required by Rule 14 of the Revised Rules of the Supreme Court of the United States and therefore sees no reason for this Court to review the issue of her dismissal from the suit.

On page 4 of the plaintiff's Petition, he begins his "Statement" with the following phrase: "In 1986 only months after encouraging her husband, Rodney Roush ("Plaintiff"), to adopt her son who was born of a previous marriage, Respondent, Judith Roush, ("ex-spouse") initiated a divorce action...." This first allegation is not part of the plaintiff's complaint, is irrelevant and inflammatory in its inference, is incorrect and should not be considered by this Court. Similarly, the plaintiff's comments beginning at the bottom of page 7 and continuing on page 8 regarding his appeal to the

West Virginia Supreme Court on his allegation that his wife was not yet divorced from her prior husband when she married the plaintiff, is not before this Court, is irrelevant, and fails to have mentioned that the appeal was resolved in favor of Mrs. Roush. The West Virginia Supreme Court of Appeals affirmed the opinion of the Circuit Court below.

On pages 8 - 9 of the plaintiff's Statement of Facts, respondents do not dispute the claim that the plaintiff's adopted son lived in North Carolina with his natural father for a while; however, while the plaintiff admits he objected and excepted to the recommendation of the Law Master which included a reduction in the son's support from $150.00 to $50.00, the plaintiff neglects to inform this Court that by

proper Court order the Honorable Herman Canady, Circuit Court of Kanawha County, West Virginia, dismissed the plaintiff's claims that he be relieved of his child support obligations for his adopted son by Order dated August 29, 1990. This is the only Court Order on this subject. As the plaintiff admits on page 6 of his Statement of Facts, recommended orders are "not binding or effective...until reviewed and confirmed by the Circuit Court (W. Va. Code § 48A-4-4)."

On page 10 of the plaintiff's Statement he refers to the Notice to Obligor, which Notice can be found on pages 144-49 of the Appendix to this Court. Such document reflects that the plaintiff, was in arrears $400.00 on his spousal support, not "alimony arrearage." The document itself at para-

graphs 10 and 11 indicates that the plaintiff is to respond in writing. While the plaintiff at page 10 indicates he requested a hearing; nowhere in his complaint or in his Statement does he indicate that he ever followed the requirements as set forth in the notice to him. Further, on page 11 of the plaintiff's Statement is a long recital of what he allegedly stated before Wickline, the paralegal at the DHS, and what happened thereafter. None of the recital of the facts on page 10 - 13 is contained in the plaintiff's complaint. The Affidavit which is attached to the plaintiff's complaint as Exhibit 2 states only that the plaintiff's counsel "recalls the Family Law Master having a conversation with someone at the office of the Department of Human Services; however, he

[the lawyer] does not recall the exact nature of the conversation other than to generally state that it dealt with a mistake regarding the calculation of arrearages in his [Mr. Roush's] case." Affidavit at Para. 4. (App. 151-52).

On page 13 - 14 are several references to a deposition of Wickline, which deposition was not before the United States District Court when it entered its order. The deposition was taken on March 29, 1991, while the Motions to Dismiss were pending. The Order granting the Motion to Dismiss was entered April 18, 1991 and formed no part of Judge Haden's opinion and order.

The plaintiff, beginning at the bottom of page 15 and on page 16 of his Statement, alleges an overpayment of $800.00, but admits that he received due process, in that the DHS reduced

the amount of wage withholding (not "Suggestion" as the plaintiff likes to call it). However, the plaintiff neglects to inform this Court of his admission in his complaint at paragraph 5-D that he still had an arrearage of $80.00. (App. 132-33).

The respondents dispute all claims of alleged overpayment except as stated in the plaintiff's complaint at paragraph 5-F, that in July, 1989, Mrs. Roush had been overpaid an amount of $121.15. (App. 134-35). This information had been provided to her by notice from the DHS which notice included the information that such overpayment would be withheld from future payments to her and the children. The plaintiff neglects to mention that notice or the remedy. On page 17 of the Statement,

the plaintiff attempts to create an inference that Mrs. Roush had received $2,000.00 in overpayments and agreed to such. This is clearly not the case as revealed by the plaintiff's complaint in paragraph 5-F.

Finally, it should be noted that the plaintiff's reference to the Writ of Prohibition filed by Mrs. Roush with the West Virginia Supreme Court of Appeals is not before this Court and has no relevance. Regardless, the plaintiff neglects to inform the Court that Mrs. Roush prevailed.

The respondents preserve their objections to the Statement of the Facts as set forth above and further object to mislabeling wage withholding pursuant to the West Virginia Enforcement of Family Obligations Act (W. Va. Code §48A-1-1, et seq., as a "Suggestion" of

wages. The respondents also object to the inflammatory language used throughout the plaintiff's Petition, such as "star chamber litigation", page 23; "Whereas FLM's are paid primarily by the DHS...through funds churned-up in the cases before them", page 28 and the like. Not only is such argument improper and not based on the pleadings, it is unprofessional.

II. SUMMARY OF ARGUMENT

The DHS and Wickline, in her official capacity as an employee of the Department, were properly dismissed from this action because they are not persons under 42 U.S.C. § 1983. Moreover, W. Va. Code § 48A-5-3 (1986), is constitutional in that it provides an obligor with notice of the withholding, the opportunity to contest the withholding, and notice that certain

exemptions exist under state and federal law. Finally, the plaintiff's § 1983 claims against respondents, Mrs. Roush and RP were properly dismissed as neither Mrs. Roush or RP were acting under color of state law.

III. ARGUMENT

A. THE WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES AND BETTY WICKLINE, IN HER OFFICIAL CAPACITY AS AN EMPLOYEE OF THE DEPARTMENT, ARE NOT PERSONS WITHIN THE MEANING OF 42 U.S.C. § 1983 AND, THUS, WERE PROPERLY DISMISSED FROM THIS ACTION.

In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), this Court held "that a State is not a person within the meaning of § 1983." Id. at 64. Furthermore, this Court also noted that its holding applied not only to states, but "governmental entities that are considered 'arms of the state'." Id. at 70. Finally, this Court con-

cluded that a suit against a state official in his or her official capacity amounts to a suit against the official's office and, as such, is no different from a suit against the State. Id. at 71.

In the case at bar, the plaintiff, pursuant to 42 U.S.C. § 1983, filed this action against the DHS and Wickline, acting in her official capacity as an employee of the DHS.[2] Will dictates that the action against the DHS

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[2] In his Petition, the plaintiff relies upon this Court's recent decision in Hafer v. Melo, 60 U.S.L.W. 4001 (1991), for the proposition that state officials can be sued for monetary damages in § 1983 actions in their personal capacities. The DHS and Wickline are in agreement with this assertion, but point out to the Court that at no time prior to this Petition has the plaintiff ever raised the issue that this action was brought against Wickline in her personal capacity. Therefore, it is inappropriate for the Court to consider the issue at this time.

and Wickline, acting in her official capacity, cannot be maintained and that the decisions of the lower courts in granting and upholding the dismissal of the plaintiff's complaint were appropriate.

B. W. VA. CODE § 48(A)-5-3 (1986) PROVIDES AN OBLIGOR WITH NOTICE THAT HIS WAGES ARE TO BE WITHHELD, THAT HE IS PERMITTED TO CONTEST THE WITHHOLDING AND THAT STATE AND FEDERAL EXEMPTIONS EXIST. THE STATUTE IS THEREFORE CONSTITUTIONAL.

West Virginia Code § 48A-5-3 (1986),[3] authorizes the DHS to pursue and enforce an order of alimony and child support, through the withholding

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[3] Since the plaintiff's filing of this action, the West Virginia Legislature has revised W. Va. Code § 48A-5-3 (1986). For purposes of this Response, however, the respondents refer to the statutory section as it existed at the time the complained of withholding was implemented. This Court should note that the statute set forth in the Appendix is the revised version.

of wages, if the individual required to make such payments is in arrears. The plaintiff asserts that this statute, utilized by the DHS to withhold his wages, is unconstitutional. Although it is not entirely clear from the plaintiff's Petition, it appears that the plaintiff relies upon three factors to support this contention: (1) the statute does not require the DHS to notify the obligor of the maximum amount that can be withheld from his wages; (2) the statute does not require the DHS to notify the obligor of earnings exemptions to which he may be entitled; and (3) the statute does not provide for a notice and a hearing before the obligor's wages are withheld. (Petition at 30-31, 35-36, 44). In so arguing, the plaintiff has either ignored or misapprehended applicable

law, as well as the relevant facts of this case.

In Duranceau v. Wallace, 743 F.2d 709 (9th Cir. 1984), the 9th Circuit addressed an issue virtually identical to that presented in the case at bar, as the plaintiff challenged the constitutionality of the procedures prescribed by Washington law to collect past due child support. The challenged state law empowered the Washington Department of Social and Health Services (Department) to collect child support as the subrogee or assignee of a judgment of the superior court. Id. at 710. To effectuate the collection, the Department was required to serve the debtor with a notice advising him of the amount due and that his property was subject to collection. Id. No sooner that 20 days later, the Depart-

ment could then serve an "order to withhold and deliver" on anyone believed to have property belonging or due to the debtor. Id. at 711. The debtor was also served with a copy of the withholding order. Id. Additionally, the withholding statutes required that the withholding order "state in summary" the wage exemption to which the debtor may be entitled. Id. at 713. Finally, the statutes permitted the debtor to seek judicial relief from the "order to withhold and deliver" on the basis that no support debt is due and owing. Id. at 711. Although not required by statute, the Department encouraged the debtor to discuss any disagreement or defenses with the Department's support officer in charge of the case before seeking judicial review. Id.

The plaintiff first claimed that the Washington withholding statutes violated his right to due process because they did not provide him with a prompt post-garnishment administrative hearing. Id. The plaintiff argued that the current administrative procedure, a meeting with the support officer, was too informal and that the judicial option was too costly and intimidating. Id. at 712. To determine whether the plaintiff's due process rights had been violated by the absence of a formal administrative hearing, the Duranceau Court applied the balancing test enunciated by this Court in Matthews v. Eldridge, 424 U.S. 319 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation

> of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved in the fiscal administrative burdens that the additional or substitute procedural requirement would entail.

Duranceau, 743 F.2d at 711 (citing Matthews, 424 U.S. at 335).

After applying the balancing test set forth in Matthews, the circuit court concluded that the Washington withholding statutes did not violate the plaintiff's due process rights. The court explained:

> We have weighed the factors which bear on Duranceau's claim. Because of the strong government interest in the support of children and the expeditious enforcement of judgments, the relatively small risk of erroneous deprivation, and the negligible value of alternative procedures, we find the present procedures do not violate due process.

Duranceau, 743 F.2d at 712. Perhaps of more importance to the case at hand,

the court stated that "[i]t is hard to imagine a more compelling state interest that the support of its children." Id. at 711.

The plaintiff also contended that his due process rights were violated because the Department did not adequately notify him of the earnings exemptions to which he was entitled and all of the available defenses and procedures which could be utilized to challenge the "order to withhold and deliver." Id. at 713. As noted above, the withholding statutes simply required that the Department "state in summary" the wage exemptions. Also, the statutes did not require the Department to notify the plaintiff of all available defenses and procedures to challenge the withholding. Id. Nonetheless, the Court found that the plaintiff was

adequately notified of the garnishment proceedings holding "that Duranceau received adequate notice of the impending seizure, possible defenses, and the manner of asserting those defenses." Id. at 714.

In McCahey v. L.P. Investors, 774 F.2d 543 (2d Cir. 1985), L.P. Investors obtained a valid default judgment against the plaintiff, a single mother of three children, for unpaid rent. Id. at 545. To collect the judgment, L.P. Investors hired a collection agency, which in turn hired an attorney, Allen Rosenthal. Id. Rosenthal ascertained that McCahey had a checking account in Island State Bank and, thereafter, served the bank with a restraining order directing the bank to stop all payments on the account. Id. As required by New York law, Rosenthal

then sent a formal "Notice to Judgment Debtor" to the plaintiff. Id. The Notice disclosed the name of the judgment creditor, informed the plaintiff that her property had been taken and advised the plaintiff that some forms of property were exempt from seizure. Id.

The plaintiff challenged the New York post-judgment attachment statute procedures claiming that they violated her right to due process because: (1) she did not receive notice and a hearing before her property had been seized; (2) a neutral judicial officer did not issue an order allowing the seizure; and (3) the notice did not adequately explain to the judgment debtor the procedure for pursuing an exemption claim. Id. at 549.

The circuit court, however, disagreed with the plaintiff's contentions and affirmed the district court's dismissal of the complaint:

> The district court concluded that post-judgment remedies satisfy due process requirements if they provide: (i) notice to judgment debtors that their property had been seized; (ii) notice to judgment debtors of exemptions to which they may be entitled; and (iii) a prompt opportunity for judgment debtors to challenge the seizure and assert their exemptions. The majority of courts have reached similar conclusions, and we also believe these requirements strike a fair balance between the competing interests.

Id. at 549 (citations omitted).

The McCahey Court adamantly rejected the plaintiff's argument that she was entitled to notice and a hearing before the post-judgment seizure occurred recognizing that "(t)hat level of procedural protection for debtors is not constitutionally required even in the

case of pre-judgment attachments when liability has not been determined." Id. at 550.

Other circuit courts have ruled in a fashion consistent with the Ninth and Second Circuits in evaluating post-garnishment procedures. The courts have recognized that the debtor's right to due process is not violated simply because he did not receive notice and a hearing before attachment and simply because he was not informed of every specific exemption to which he may be entitled. Even the Fourth Circuit which the plaintiff boldly, but erroneously, contends "has ignored any due process rights" in post-judgment garnishment situations, has employed the Matthews, Duranceau and McCahey analysis. See, e.g., Reigh v.

Schleigh, 784 F.2d 1191, 1197 (4th Cir. 1986) ("We are satisfied that a notice which advises the judgment debtor that there are state and federal exemptions that may be available to him, coupled with notice of the right to contest the attachment, meets the requirement of due process"); Dionne v. Bouley, 757 F.2d 1344, 1354 (1st Cir. 1985) ("we think the debtor must be informed of the attachment and of the availability of a prompt procedure to challenge the attachment together with the fact, generally stated, that there are certain exemptions under state and federal law which the debtor may be entitled with respect to the attached property. The state, however, is not required to supply the debtor with a 'laundry list' of statutory exemptions")(citations omitted); Brown v. Liberty Loan Corp.

of Duval, 539 F.2d 1355, 1363 (5th Cir. 1976) ("We hold therefore that due process of law does not require notice and an opportunity for a hearing on entitlement to the exemption before wages are garnished in accordance with Florida law").

The above law, viewed in accordance with the facts of this case, demonstrates that the plaintiff's claims that he was denied due process of law and that W. Va. Code § 48A-5-3 is unconstitutional are totally without merit. First, as Reigh, McCahey, Dionne, Duranceau and Brown establish, due process did not require that the plaintiff receive notice and a hearing before his wages were attached. Thus, the plaintiff's statement that this Court's decision in Matthews v.

Eldridge requires that he be afforded a pre-attachment hearing is a blatant and inexcusable misstatement of the law, especially in light of the fact that the above courts employed the Matthews analysis in arriving at the conclusion that a pre-attachment hearing was not required. Second, the above cases also establish that a debtor, such as the plaintiff, simply be notified that there are state and federal exemptions which may be available to him. Contrary to the plaintiff's assertion, W. Va. Code § 48A-5-3(d)(9) and (10) require that such a notice be given to an obligor, as it states the obligor shall be informed of the following:

> That if the obligor desires to contest the withholding on the grounds that the amount to be withheld is incorrect or that withholding is not proper because of mis-

> takes of fact, he or she must, within fourteen days of the date of the notice, inform the children's advocate in writing of the reasons why the proposed withholding is contested;
>
> That a mistake of fact exists only when there is an error in the amount of current or overdue support claimed in the notice, there is a mistake as to the identity of the obligor, or the amount of the proposed withholding exceeds the amount permitted to be withheld under applicable federal or state law;

W. Va. Code § 48A-5-3(d)(9) and (10) (1986).

More importantly, the undisputed facts in this case establish that the plaintiff received such a notice. A "Notice to Obligor" was sent to the plaintiff on March 28, 1988, informing the plaintiff that a certain amount of his wages would be withheld and that he could contest the withholding if a "mistake of fact" existed. (App. at 144-49). The notice further

informed the plaintiff that a "mistake of fact" existed if the amounts withheld "exceede(d) the amounts permitted under federal or state law." (App. 145-46). The Fourth Circuit's decision in Reigh is of particular importance to the case at hand. In Reigh, the court upheld the constitutionality of Maryland's post-judgment attachment rules which simply required the debtor to be notified, after attachment, " 'that federal and state exemptions may be available' to him." Reigh, 784 F.2d at 1193 (quoting Maryland post-judgment attachment rules).

To support his argument that he is entitled to a hearing before attachment is commenced, the plaintiff, without any reference to applicable law, attempts to recharacterize the attachment

that occurred in this case as a pre-judgment attachment. (Petition at 32-33). As noted previously, even if this were a pre-judgment case, a pre-attachment hearing would not be constitutionally required. McCahey, 774 F.2d at 550. Contrary to the plaintiff's assertion, however, the attachment that occurred in this case was post-judgment, as it took place after the entry of a final divorce decree by the Kanawha County Circuit Court, awarding both spousal and child support. (App. at 3, 12). The case of Halperin v Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) supports the conclusion that the withholding in this case was post-judgment.

In Halperin, a divorce decree was entered requiring the plaintiff to pay both alimony and child support. Id. at 1010. The plaintiff failed to make the

required payments and, thus, his wife, pursuant to state law, sought to garnish his wages. Id. at 1010-11. Thereafter, the plaintiff filed an action in federal district court claiming that the Georgia garnishment statutes were unconstitutional because they allowed for the deprivation of property without due process of law. Id. at 1011.

In support of his claim, the plaintiff stated that the judgment for alimony used as a predicate for the garnishment action was entirely different from an ordinary judgment. Id. Unlike an ordinary judgment, it was not for a sum certain, and both parties had rights and duties under the decree which may have resulted in the termination of alimony payments. Id. Thus, the plaintiff contended, as does the

plaintiff in this case, that any garnishment which occurred was analogous to a pre-judgment garnishment, and he was therefore entitled to notice and a hearing before garnishment. The district court, however, disagreed:

> The ambulatory nature of a Georgia alimony judgment is a recognition that support is not the duty of a debtor arising in a commercial transaction but, rather, is a continuous obligation providing for the welfare of a former wife and children. Likewise, by the terms of the alimony decree in question, it was adjudicated that Mr. Halpern is liable to make alimony payments in installments. By the nature of the judgment he was notified that the installments may be collected by garnishment unless he takes the initiative of showing that new conditions have arisen justifying a change in terms. This merely reflects the state policy requiring the husband to affirmatively show that a duty created by a valid decree has ended. Any other result, requiring additional notice and hearing before garnishment, will result in shifting the burden to the wife which the original di-

vorce decree places upon the husband.

Id. at 1012. (emphasis added).

The foregoing discussion demonstrates that W. Va. Code § 48A-5-3 is constitutional and that the plaintiff was afforded due process. The Kanawha County Circuit Court entered a divorce decree requiring the plaintiff to pay alimony and child support. (App. at 3, 12). The plaintiff fell in arrears and, therefore, pursuant to W. Va. Code § 48A-3-5, the plaintiff's wages were withheld. Although not constitutionally required, the statute provides an obligor, such as the plaintiff, with notice of the attachment before it occurs and provides the plaintiff with an opportunity to contest the attachment before a DHS officer. W. Va. Code § 48A-5-3(d). The statute also requires the DHS to notify the obligor that federal and state exemptions exist. W. Va. Code § 48A-5-3(d)(10). These dictates were followed in the case at hand. (App. 144-49). Therefore, the plaintiff's claims are without merit, and his Petition must be denied.

C. JUDITH ROUSH IS NOT A STATE ACTOR. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF HER FROM THE LAWSUIT.

1. The question is not presented for review.

Rule 14 of the Revised Rules of the Supreme Court of the united States sets the standard for questions presented for review. The question is to be "short and concise."

> Statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the Petition, or fairly included therein, will be considered by the Court.

The plaintiff states four questions for this Court's consideration. None of the four questions address directly or indirectly the basis for Mrs. Roush's dismissal from the lawsuit; that is, that she was a private citizen and therefore not subject to suit under § 1983 because she did not act "under color of state law." Nevertheless, despite the fact that no question addressing Mrs. Roush's standing in the lawsuit is posed, the plaintiff launch-

es into an argument regarding Mrs. Roush's conduct beginning on page 44 through page 47, page 52 and pages 56-57. For this reason, Mrs. Roush presents the following argument to preserve her objection.

2. The complaint asserts no cause of action against Mrs. Roush under 42 U.S.C. § 1983.

Plaintiff's complaint acknowledges that Mrs. Roush, is the ex-wife of the plaintiff. Plaintiff's Complaint at ¶ 3. (App. 124-26). Plaintiff's complaint also alleges that Judith Roush "together with the Department of Human Services and its employee, Betty Wickline, initiated the wage suggestions complained of herein". (App. 126). These two statements form the sole basis asserted by the plaintiff in his complaint from which the Court is asked to infer that Mrs. Roush acted under

color of state law. The only other claim against Mrs. Roush is set forth in the fifth count of the complaint wherein the plaintiff attempts to allege a West Virginia, common law fraud action. (App. 140-41). The pendant state law claims were dismissed by the District Court when it dismissed the §1983 claims against Mrs. Roush.

The Divorce Order dated January 27, 1988, ordered the plaintiff to provide support for his ex-wife and two children. (App. 3, 12). Prior temporary orders, as essentially admitted to by the plaintiff, were not followed by him in that he admits in his complaint that on February 11, 1987, a recommendation/order was entered "confirming plaintiff was in arrears in his alimony obligations...in the amount of $925.00 [and] granted plaintiff's ex-wife judg-

ment in that amount...." Plaintiff's Complaint, Para. 5A. (App. 128-29). Subsequent to the divorce, the plaintiff became delinquent within thirty days. See, Exhibit 1 to the Complaint indicating a $400.00 arrearage. (App. 144-49). Mrs. Roush sought the assistance of the Child Advocate Office as she had the statutory right to do. Sometime after April 7, 1988, Complaint at Para. 5C, wage withholding commenced. (App. 130-31).

As the complaint indicates, Mrs. Roush's only involvement with the state was to apply for services as an Obligee pursuant to West Virginia Code § 48A-1-1. To suggest that such action makes Mrs. Roush a state actor would mean that every applicant/recipient of food stamps, public health care, or any other federal or statement entitlement,

or of child support collected and distributed by the state's Child Advocate Office, is acting under color of state law.

For a private person to be deemed to be acting under color of state law requires the showing that the individual was "suffused and clothed with the trappings of official 'state action'." Nesglo, Inc. v. Chase Manhattan Bank, N.D., 506 F.Supp. 254, 259 (D.P.R. 1980) (citations deleted); accord, Calvert v. Sharp, 748 F.2d 861, 862 (4th Cir. 1984). No such conduct which could support such a finding is alleged in the complaint and for good reason. Nothing distinguishes Mrs. Roush's request for help from any other mother who needs regular monthly support to feed and clothe herself and her children. Mrs. Roush was neither em-

ployed by the state nor volunteered her services there. The complaint asserts no set of facts by which the Court could infer Mrs. Roush acted under color of state law.

Mrs. Roush is neither a state official nor acted together with a state official or obtained such aid from a joint action with a state official to make her conduct "chargeable to the State." Jackson v. Pantazes, 810 F.2d 426, 428-9 (4th Cir. 1987) citing, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). Other than completing an application for services as expressly permitted by West Virginia law, Mrs. Roush had no involvement in collection, computation, or distribution of support from the plaintiff's wage withholding, nor is any such involvement alleged by the plaintiff. Use of the procedures

set forth in a post-judgment statute (collection of support following a divorce order) by a private citizen does not "'constitute [] 'joint participation' or 'conspiracy' with state officials satisfying the §1983 requirement of action under color of law.'" Lugar, 457 U.S. at 940, n. 21 (citations deleted).

This Honorable Court in its decision in Lugar set forth the possible tests which may be employed by a Court to determine whether a private citizen's conduct "is fairly attributable to the State." Id. at 937. The two part analysis first focuses on whether the alleged deprivation is caused by the exercise of some right or privilege created by the state or rule of conduct imposed by the state or by a person for whom a state is responsible. Id. Mrs.

Roush conceded for the limited purposes of her Motion to Dismiss that the first part of the test is factually alleged or reasonably inferred from plaintiff's complaint.

The second part of the test requires that "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he is acting together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." Id. It is this part of the analysis which is unsupported by anything alleged in plaintiff's complaint. Mrs. Roush was not the primary beneficiary of the assistance provided by the Child Advocate Office. The Child Advocate Office at the time of the actions com-

plained of represented children. See, e.g., W. Va. Code § 48A-2-2. ("It is the sense of the Legislature that there must a state office, which as its primary function, protects and promotes the best interest of children"). Id. The plaintiff has not chosen to sue his children who were the stated beneficiaries of the actions of the Child Advocate Office. Mrs. Roush sought the assistance of the Child Advocate Office to assist in obtaining the support which the Court in the divorce order had ordered the plaintiff to provide for her and her children. She received no more aid than any of the multitudes of "Obligees" are entitled to under the child support enforcement statutes, state and federal. There are no set of facts alleged which create a reasonable inference that Mrs. Roush was a state

actor or that she should have had some sort of notice that the wage withholding to satisfy the plaintiff's obligation was "illegal and improper" as the plaintiff alleges in his complaint, especially when numerous hearings and court proceedings did not result in such a finding. Indeed, as a close reading of the plaintiff's Statement of Facts in his Petition and his complaint indicate, the plaintiff had any number of hearings and took any number of exceptions to proposed orders so as to give all parties to the proceedings comfort that all due process to which the plaintiff was entitled to occurred. See, e.g., Complaint, Para. 5A (hearing February 11, 1987); Para. 5B (hearing February 16, 1988); Para. 5D (DHS "Responded to plaintiff's repeated written demands and reduced the suggestion by

$150.00 per month to a total of $550.00 per month plus 10%...,); Para. 5E (hearings before Family Law Master Tantlinger and Kanawha Circuit Judge John Hey, July, 1989; Petition at pp. 8-9 (hearing and objections and exceptions to recommendations taken February 16, 1988); and other hearings which are not presently before this Court. (App. 127-33). Further, Mrs. Roush believes this Court should take note of the fact that a hearing is presently scheduled on the alleged overpayments on Petition of the plaintiff which is set to be heard by the Kanawha County, West Virginia Family Law Master at the end of April, 1992.

The test announced in Lugar v. Edmondson was applied by the Fourth Circuit in Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987). As the United

States District Court pointed out in its opinion in Roush, the private bail bondsman who was found to have acted under color of state law in Jackson, worked with a police officer to gain access to a private individual's home and jointly harassed the individual. This set of facts met the test for when a private citizen can be deemed to be a state actor. "The facts set forth in Jackson indicates that in the eyes of the plaintiff homeowner there was no way to distinguish the private bondsman from the police officer." Roush v. Roush, 767 F.Supp. 1344, 1353 (S.D. W. Va. 1991). Clearly, such is not the case here. Mrs. Roush sought the assistance of the state agency to receive the support she and her children were entitled to pursuant to the divorce order. The support came, in varying

amounts, through the wage withholding process. Mrs. Roush did not participate in that withholding process. It cannot be enough to make her a "state actor" that she merely invoked appropriate West Virginia procedure. Further, as this Court noted, Lugar is a narrow case limited to the context of prejudgment attachment suits. Lugar, 457 U.S. at 940, n. 21. The plaintiff is complaining about the state's method of obtaining and providing to his children the support he was obligated to pay after the divorce order was entered.

Nor can the plaintiff claim that he had stated a conspiracy under §1983. The assertion of a conspiracy in a §1983 action must be pleaded with specificity. Martin v. Supreme Court of New York, 644 F.Supp. 1537 (N.D.Y.

1986). Mere conclusory allegations are insufficient. Grow v. Fisher, 523 F.2d 875, 878-79 (4th Cir. 1975). Further, The plaintiff's state law claim against Mrs. Roush sounding in fraud states that "conduct upon her part is a fraud both against the DHS and the Courts of the State and against the plaintiff." Complaint, Para. 16. (App. 140-41). The plaintiff cannot have it both ways. His state law fraud claim suggests just the opposite of any conspiracy between Mrs. Roush and the DHS. As this Court noted in Lugar, conduct " 'unlawful under state law...' could not be ascribed to any governmental decision." Id., 457 U.S. at 94D. As a matter of law, the fraud claims in the plaintiff's complaint cannot be part of his alleged § 1983 claims.

Finally, Mrs. Roush pursuant to Rule 14, Revised Rules of the Supreme Court of the United States, objects to the bald assertion of alleged facts not part of this appeal. She objects to the claims on page 45 that she had any knowledge that the plaintiff was paying support for their son into a savings account, particularly in light of plaintiff's admission that he objected and excepted to the Family Law Master's recommendation regarding support for their son. Mrs. Roush also objects to the fact that the plaintiff failed to mention to this Court the binding Order of Judge Canady refusing to release the plaintiff from his obligations to his "absent son." Further, Mrs. Roush objects to the claims on page 45 and 46 to the extent they create an inference that the plaintiff did not appear in

front of the Family Law Master on any number of occasions and did not advise the DHS many times regarding his complaints and receive modifications when appropriate. As the plaintiff admits on page 46 of his Petition, the DHS did change the withholding to reflect the son's reaching maturity. The fact that the Child Advocate Office bureaucracy may have taken a few months to effect the change, does not create an inference that Mrs. Roush used or abused any state procedures.

Wherefore, because the complaint alleges no set of facts which clearly state a conspiracy between Mrs. Roush and the state such as to make her a state actor under §1983, nor allege conduct by her attributable to the state, which might make her amenable to suit under § 1983, the decision of the

United States District Court for the Southern District of West Virginia to dismiss Mrs. Roush, which decision was affirmed by the Fourth Circuit, was in all respects proper. In addition, because the plaintiff failed to follow this Court's Rule 4, Revised Rules of the Supreme Court of the United States, as to Mrs. Roush and include the issue of whether the plaintiff stated a claim against Mrs. Roush in his § 1983 lawsuit, the Court should and need not review the issue at all.

D. UNDER APPLICABLE STATE LAW RP WAS REQUIRED TO HONOR THE ORDERS DIRECTING THAT MR. ROUSH'S WAGES BE WITHHELD AND WOULD HAVE BEEN LIABLE FOR ANY AMOUNTS NOT WITHHELD. THE DISTRICT COURT PROPERLY RULED THAT MR. ROUSH FAILED TO STATE A CLAIM AGAINST HIS EMPLOYER UPON WHICH RELIEF COULD BE GRANTED AND THE COURT OF APPEALS CORRECTLY AFFIRMED THAT DISMISSAL.

The plaintiff's petition (just as his pleadings before) is devoid of any assertion relating to RP which raises any issue under the Constitution of the United States or any federal law. Indeed, the claims purported to be made against RP were entirely creatures of the law of the State of West Virginia.

The District Court's granting of RP's Motion to Dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure was solely based upon that Court's application of the law of the forum state. Furthermore, the petition does not, and could not, raise any issue of the constitutionality of the district court's granting of the Motion to Dismiss. Consequently, the petition raises no issue relating to RP which ought to be considered by this Court and at least as to RP (if not its en-

tirety) the petition should be refused.

The sole involvement of RP in this matter is as an employer of the plaintiff which received and obeyed wage withholding orders issued by the DHS. RP is "caught in the middle" of the fallout from an apparently bitter domestic dispute. RP was not involved in any of the proceedings leading to the issuance of the withholding orders. It is solely a "source of income" subject to garnishment under West Virginia law and upon receipt of lawful orders from a state agency, it obeyed them. RP had no duty or legal right to challenge such orders. It was obligated by law to obey and it did. The District Court's Order dismissing RP from this case was required by State law, and the plaintiff has not identified any interpretation of State law which would

indicate that the District Court's opinion was improper, or that the Fourth Circuit's affirmance of the same was wrong.

Chapter 48A, Article 2 of the West Virginia Code establishes the West Virginia Child Advocate Office "shall pursue the enforcement of support orders through the withholding from income of amounts payable as support ...." W. Va. Code § 48A-3-3(f). In addition, Article 5 of the Enforcement of Family Obligations Act provides that "the withholding from an obligor's income of amounts payable as spousal or child support shall be enforced by the children's advocate in accordance with the provisions of this section." W. Va. Code § 48A-5-3(a).

As a part of the Child Advocate Office's enforcement powers, W. Va. Code § 48A-5-3(f) provides as follows:

> The **source of income of any obligor who is subject to withholding, upon being given notice of withholding, shall withhold from such obligor's income the amount specified by the notice** and pay such amount to the child advocate office for distribution in accordance with the provisions of section four, article three of this chapter. The notice given to the source of income shall contain only such information as may be necessary for the source of income to comply with the withholding order. Id. (emphasis added).

The source of income is **required** by law to send the specified amount to the Child Advocate Office within ten (10) days of the date the obligor (employee) is paid. W. Va. Code § 48A-5-3(h). The required withholding must take place no later than the first pay period or first date of payment of income

which occurs within fourteen (14) days following receipt of the notice of withholding. In addition, "withholding of amounts payable as support ... is **binding on the source of income** until further notice by the child advocate office." W. Va. Code §§ 48A-5-3(k), (j).

In order to determine the amounts which may be withheld from any obligor's income, **the Child Advocate Office of the Department of Human Services** (not RP) must, among other requirements, "ascertain the status of the payment record of the obligor" [West Virginia Code § 48A-5-3(e)(1)]; review and interpret the terms of a support order or master's recommended order entered by the Circuit Court [West Virginia Code § 48A-5-3(d)]; examine the obligor's "payment record

... to determine whether any arrearages are due for amounts which should have been paid prior to a 12-week period which ends with the work week for which withholding is sought to be enforced" [West Virginia Code § 48A-5-3(e)(1)]; determine whether or not the obligor is supporting another spouse or dependent child other than the spouse or child for whom the proposed withholding is being sought [West Virginia Code § 48A-5-3(e)(2), (3)]; and consider whether the obligor has purposefully acted to minimize his or her income [West Virginia Code § 48A-5-3(e)(6)]. By statute, these and other necessary determinations are to be made by the DHS' Child Advocate Office, and no other entity is charged with the responsibility or given the right to perform this analysis.

Moreover, the plaintiff's assertions with respect to an undefined measure which he identifies as "net weekly wages" is absolutely irrelevant to these determinations. In this regard, the definition of "earnings" and "disposable earnings" are not confined to income received from any one employer of an obligor. West Virginia Code § 48A-1-3(a)(9). In fact, the percentage limitations on amounts which may be withheld under the Act do not apply to the wages the plaintiff receives from RP; they apply to the his total disposable earnings. RP would have no knowledge of this figure, and the plaintiff does not allege otherwise. Indeed, RP had no ability, obligation or right to inquire into plaintiff's income sources or to seek information relative to his financial obligations.

As an additional enforcement power, W. Va. Code § 48A-5-3(n) provides that:

> A source of income is liable to an obligee, including the State of West Virginia and the [DHS] where appropriate, for any amount which the source of income fails to withhold from income due an obligor following receipt by such source of income of proper notice under subsection (f) of this section .... Id. (emphasis added)

Thus, the West Virginia Legislature clearly intended that any dispute as to the amount of income properly withheld is to be brought to the attention of the DHS, a Family Law Master, or, if necessary, a Circuit Court. See W. Va. Code §§ 48A-3-6; 48A-4-1(i); 48A-4-6; 48A-4-7. A source of income is under a mandatory obligation to comply with a notice requiring income withholding, and has no opportunity to object to the method by which the amount is calculated or the procedures used in issuing

such a notice. The plaintiff's suggestion that RP should have simply disobeyed these orders is outrageous. His claim that having obeyed the orders, RP is liable to him for damages is unbelievable.

As a final example of the futility of his argument, the plaintiff's admission that he has pursued administrative remedies available under the Act "for several years now" also demonstrates the total absence of any basis for asserting a claim against RP. Even assuming the repayment procedures contained in the regulations are inadequate, RP bears absolutely no responsibility whatsoever for this deficiency. Indeed, but for the fortuitous circumstance that RP happened to be the plaintiff's employer when he opted to stop pursuing these repayment proced-

ures, another entity which serves or has served as a source of income for him could have just as easily been subject to a meritless suit based on the theories of the plaintiff's Complaint against RP. Clearly, his mere dissatisfaction with the Act as written does not suffice to support a claim against RP, or any other source of income, which had nothing whatsoever to do with its enactment.

The plaintiff does not allege that RP has taken any action at variance with the requirements of W. Va. Code § 48A-1-1, et seq. Further, he does not allege that RP has done anything other than obey notices issued pursuant to the Act and served upon RP by DHS. Thus, there is no dispute about the fact that RP had no connec-

tion whatsoever with the initiation of the suggestion procedures against him.

While he repeats various W. Va. Code provisions in his petition before this Court and discusses the alleged impropriety of the procedures followed thereunder in his case, it is clear that RP, the employer, was not a party to those proceedings, was provided no notice of the same, and had absolutely no right to participate in them. Indeed, under the statute, RP was a party against whom the suggestion procedure was applied and had no right to object to the validity of any notice of withholding.

Brief consideration of those decisions cited by the plaintiff shows that they involved factual circumstances clearly divergent from those present in this case. Lynch v. House-

hold Finance Corp., 405 U.S. 538, 31 L. Ed.2d 424 (1983) was a case dealing with the pre-judicial garnishment of plaintiff's savings account for an alleged nonpayment of a promissory note, in which plaintiff sued for declaratory and injunctive relief asking that the statute be declared unconstitutional. Coltharp v. Cutler, 419 F. Supp. 924 (D.C. Utah 1976) involved allegations of abuse of process followed by an alleged use of an unconstitutional garnishment statute. In Coltharp, plaintiff's claim brought under 42 U.S.C. § 1983 was dismissed.

In McMeans v. Schwartz, 330 F. Supp. 1397 (D. C. Ala. 1971), the defendant filed suit against plaintiff and then utilized the state's pre-judgment garnishment statute against him. The defendant in McMeans is in the position

of petitioner's ex-wife in the present case; RP is in the position of the plaintiff's employer in the McMeans case. The employer was not named as a defendant in McMeans. The defendant in McMeans prosecuted an action under a statute which required him to file an affidavit as to the amount of debt owed by plaintiff, and certifying that garnishment was necessary. As in the present action, the employer in McMeans did nothing more than properly obey legal process served on it.

Moreover, those cases cited by the plaintiff for the proposition that a private individual can be held liable for participating in a conspiracy with state officials to deprive a person of constitutional rights are completely inapposite to the case at bar. McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th

Cir. 1970) involved a suit by a prison inmate against prison officials and a newspaper reporter for publishing parts of a report evaluating plaintiff's psychiatric condition. Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) involved a suit against a state prosecutor, the charging parties, and prosecution witnesses for allegedly trying patently false claims against the plaintiff.

Contrary to his argument, Grow appears to stand for the exact opposite proposition from that which is cited by the plaintiff. Specifically, the Court in Grow dealt with a complaint, identical in this regard to the Complaint filed by Mr. Roush herein, which alleged only that private individuals acted "in concert" with state officials. In evaluating this allega-

tion upon a motion to dismiss for fail-

ure to state a claim against the individual defendants, the Court held that this charge was not sufficiently specific to support a claim of conspiracy under 42 U.S.C. § 1983. Grow at 878-879. See also Martin v. Supreme Court of State of N.Y., 644 F. Supp. 1537 (N.D. N.Y. 1986) ("Assertion of a conspiracy in a § 1983 action must be pleaded with specificity," and where "there is nothing more in the Complaint than the allegation that [the defendant] employed the statutorily-provided mechanisms for registration of, and execution on, a judgment" this is insufficient.) The plaintiff's Complaint herein contains nothing but vague, nonspecific, insufficient and conclusory allegations. It cannot withstand scrutiny. "Acting in concert" means far more than obeying lawful orders re-

ceived. RP has no liability to the plaintiff for this aspect of his claim. The Court of Appeals properly affirmed RP's dismissal from this case and the plaintiff has failed to present any valid basis, much less a compelling need, for this Court to accept his Petition with respect to the disposition of his claims against his employer.

CONCLUSION

For the foregoing reasons, the plaintiff's petition should be denied.

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